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ABSTRACT

This report, generated by a Congressional hearing, analyzes the goals intended for the Americans with Disabilities Act (ADA) and the impact on those it was intended to protect. It also discusses the practical effects of the ADA, recent Supreme Court decisions and judicial trends in ADA enforcement, substance abuse and the ADA, and the ADA's coverage of individuals with psychiatric and mental disabilities. The report concludes with a chapter of findings and recommendations of the Commission on Civil Rights. These recommendations include: (1) restoring the intended vision of the ADA; (2) providing adequate resources to those agencies charged with enforcing its provisions; (3) enhancing education for individuals and businesses as to rights and responsibilities created by the ADA; (4) providing further incentives through the Social Security Administration for individuals with disabilities to return to the workforce; and (5) providing economic incentives for businesses that make facilities accessible or accommodate individuals with disabilities. Individual chapters discuss the road to the ADA, the effects of the ADA, judicial trends in ADA enforcement, substance abuse under the ADA, psychiatric disabilities and the ADA, and findings and recommendations. (Individual chapters contain references.) (DB)

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Sharing the Dream:

Is the ADA Accommodating All?

A Report on the Americans with Disabilities Act

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U.S. Commission on Civil Rights

October 2000

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Sharing the Dream:

Is the ADA Accommodating All?

Letter of Transmittal

The President
The President of the Senate
The Speaker of the House of Representatives

Sirs:

On November 12–13, 1998, the U.S. Commission on Civil Rights conducted a public hearing on the Americans with Disabilities Act. The purpose of the hearing was to investigate how the ADA was accomplishing its objectives of ensuring equality, independence, and freedom for people with disabilities. The Commission agreed to hear testimony on disability issues that were current, and to some extent unsettled, so the Commission could meaningfully contribute to the national discourse on the ADA. The hearing and the issues raised and discussed are timely because there remains significant discord among the federal circuit courts regarding the ADA.

The report generated by the hearing, *Sharing the Dream: Is the ADA Accommodating All?*, analyzes the goals intended for the ADA and the impact on those it was intended to protect. *Sharing the Dream* also discusses the practical effects of the ADA, recent Supreme Court decisions and judicial trends in ADA enforcement, substance abuse and the ADA, and the ADA's coverage of individuals with psychiatric and mental disabilities. The report concludes with a chapter of the Commission's findings and recommendations aimed at ensuring the goals of the ADA are reached.

There has been an increased level of participation in mainstream American society by individuals with disabilities, and the public is more sensitive and aware of people with disabilities. Individuals with disabilities, however, continue to face discrimination and difficulty in overcoming barriers that prevent them from fully participating in our society. The Equal Employment Opportunity Commission and the Department of Justice must continue their aggressive efforts in implementing and enforcing the mandates of the ADA. Moreover, DOJ should play a proactive role in enforcing the mandates of the ADA regarding physical barriers, adopt a procedure to actively seek out test cases to litigate, and carry out a random/periodic compliance review process to ensure compliance with the ADA.

Three recent Supreme Court decisions, which held that the effects of any mitigating measures must be considered, have obscured the congressional purpose for the ADA and restricted the coverage intended by the ADA, inviting continued litigation. Congress should clarify the ADA to provide that the effects of mitigating measures not be taken into account in determining whether an individual is entitled to protection under the ADA to accomplish the expressed intent of the ADA. Congress should also clarify the ADA to give the federal enforcement agencies express substantive rulemaking authority to issue regulations defining disability and offering further guidance on the definitional portions of the ADA.

ADA initially focused on accommodating individuals with physical disabilities, and individuals with psychiatric disabilities were largely ignored. After discrimination charges based on mental impairments became the largest source of complaints filed with the EEOC, the EEOC issued guidance for businesses. This guidance has been disregarded by many federal courts, which have construed coverage of the ADA with a definition of disability that is at odds with legislative intent. This has left a body of case law that is uncertain for both employers and employees. The Commission believes the scope of disability is the most important definitional term in the ADA because an individual cannot file suit under the ADA unless he or she is found to meet the definition of disabled. Thus, Congress should give the EEOC express authority to issue substantive regulations interpreting disability. Congress should also

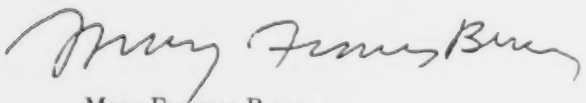
further clarify the broad intent of the ADA and give EEOC power to interpret the ADA consistent with this newly articulated congressional intent.

Consistent with one of the goals of the ADA, DOJ issued regulations mandating public entities administer services, programs, and activities that place individuals with mental disabilities in the most integrated settings appropriate for their needs. These regulations were validated by the Supreme Court, which established standards by which states and local entities must provide for the integration of individuals with mental disabilities into community-based settings. The Department of Justice, Health and Human Services, the Social Security Administration, and the Health Care Financing Agency should establish regulations that complement each other and in turn force state and local governments or administrators to establish written policies with clear, objective, and fair standards so individuals with mental disabilities may be integrated into the community-based setting most appropriate for their needs.

ADA's coverage of substance abuse was initially opposed in the passage of the ADA because of the concern that inappropriate substance-induced behavior in the workplace would be permitted and protected under the ADA. This has proved to be false. Rather, the ADA and ensuing court decisions and interpretive guidelines have made it clear an employer may prohibit the illegal use of drugs and the use of alcohol at the workplace and may discharge or deny employment to persons who currently engage in the illegal use of drugs. Companies should now establish policies that encourage employees to seek assistance and deter individuals from taking chances with their own safety, public safety, and the security of company property.

The Commission believes implementation of this report's recommendations will promote the ADA's purpose of eliminating discrimination against people with disabilities.

Respectfully,
For the Commissioners,



Mary Frances Berry
Chairperson

Acknowledgments

This report was written by co-project team leaders Michael L. Foreman and Tricia Jefferson* and attorney-advisors Barbara de La Viez, Jenny Kim Park, Peter Reilly, and Bernard Quarterman under the general supervision of Edward A. Hailes, Jr., acting general counsel. The report is based, in substantive part, on a hearing that was organized and initial drafts of a hearing report that were written under the supervision of General Counsel Stephanie Y. Moore.* The pre-hearing research, investigation, planning of the hearing, and writing of initial drafts were conducted by project team leader Erik Brown,* attorney-advisors Sicilia Chinn,* Lynn Dickinson,* Peter Reilly, and social scientist Eileen Rudert. Staff support was also provided by attorney-advisors Tricia Jefferson,* Joseph Manalili,* and Jessica Roff,* legal technician Bernice Rhodes,* and legal secretary Pamela Moye. Legal sufficiency review was conducted by attorney-advisors Joseph Manalili,* Deborah Reid, Joyce Smith, and Audrey Wiggins. Editorial policy review was performed by Robert Anthony, Terri Dickerson, and Dawn Sweet. The report was prepared for publication by Dawn Sweet with additional legal editorial assistance by attorney-advisors Kim Ball and Barbara de La Viez.

* No longer with the Commission

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Executive Summary

The U.S. Commission on Civil Right's (Commission) report *Sharing the Dream: Is the ADA Accommodating All?* is timely and significant because it comes during the nation's designated month for recognizing individuals with disabilities and as we celebrate the 10-year anniversary of the Americans with Disabilities Act. This report is the product of a two-day hearing conducted by the Commission on November 12–13, 1998, in Washington, D.C.

After providing a historical context for its passage, this report analyzes the goals intended for the ADA and discusses the law's practical impact on those it was intended to protect, the agencies responsible for enforcing the law, and the businesses it affects. Sadly, the report demonstrates how the Supreme Court's recent narrow construction of the ADA's coverage obscures its vision, which was to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. The report also addresses several areas that have generated debate and disagreement as to the proper coverage of the ADA—issues of substance abuse and the coverage of psychiatric disabilities.

Most importantly, the report provides concrete recommendations aimed at ensuring the ADA's vision is reached, while recognizing the legitimate concerns of businesses in how the vision is achieved. These recommendations include:

- restoring the intended vision of the ADA;
- providing adequate resources to those agencies charged with enforcing its provisions;
- enhancing education for individuals and businesses as to rights and responsibilities created by the ADA;
- providing further incentives through the Social Security Administration for individuals with disabilities to return to the work force; and
- providing economic incentives for businesses that make facilities accessible or accommodate individuals with disabilities.

The Commission hearing was not intended to offer an exhaustive analysis of the ADA, nor is this report. Instead the hearing was, and this report is, intended to address some of the significant issues raised by the ADA.

At the time the Commission heard testimony on the ADA, the Supreme Court had given limited direction on the ADA. Indeed, in the eight years since the ADA's passage until the time the Commission requested testimony on the ADA, the Supreme Court only decided two cases. Since that time, the Supreme Court issued six decisions, some directly addressing issues discussed by the panelists. This report is limited by what was presented at the hearing, but the Commission would be remiss if it did not address the impact of these Supreme Court decisions on the issues discussed at the hearing.

Chapter 1: The Road to the ADA

This report first chronicles the move from a medical/charity model for society's treatment of individuals with disabilities to a civil rights model. Historically, our nation's disability policies were premised on a medical/charity model where a person's disability was to be addressed by doctors and other professionals who were to "fix" or "cure" the individual. If they could not be cured, then the individual may be entitled to some type of "charitable" benefit. With the passage of the ADA, our nation moved from this medical/charity model to a civil rights model that attempts to provide a level playing field for individuals with disabilities by securing the right of access to, and independence in, all aspects of society. The ADA, which was signed into law on July 26, 1990, is a comprehensive civil rights law seeking to ban discrimination against individuals with disabilities by ensuring equality of opportunity, full

participation in government services and public accommodations, independent living, and economic self-sufficiency.

Chapter 2: The Effects of the ADA

The testimony heard at the ADA hearing showed that individuals with disabilities believe that the ADA has made a great difference in their lives. This is reflected by their increased level of participation in mainstream American society, including better access to buildings, fuller inclusion in the community, and greater access to transportation. Since the passage of the ADA, the public is more sensitive to and aware of people with disabilities. Despite this progress, individuals with disabilities still continue to face discrimination and difficulty in overcoming barriers that prevent them from fully participating in mainstream American society, particularly in the areas of employment, access to medical benefits, and access to public transportation.

Sharing the Dream acknowledges the ADA is similar to other laws, including civil rights laws aimed at remedying discrimination based upon unjustified stereotypical beliefs, and has costs associated with protecting the civil rights of those it is intended to protect. Contrary to the misconceptions some had at the time of its enactment, there are not significant costs in complying with the reasonable accommodation provisions of the ADA. While there was testimony about concerns of costly litigation created by the ADA, there was no empirical evidence presented substantiating these concerns. Nor was it shown that there have been a significant number of frivolous cases filed under the ADA. Indeed there was no credible evidence presented that it was any more expensive to comply with the ADA's nondiscrimination provisions than it is to comply with other civil rights laws aimed at protecting individual civil rights.

One area in which there was substantial testimony at the ADA hearing was the interaction between the ADA and the receipt of Social Security disability benefits. The report concludes that the Social Security Administration (SSA) does not take into consideration the ADA's requirement of reasonable accommodation in determining continuing eligibility for disability benefits, which can discourage individuals with disabilities from re-entering the work force. Further, many federal disability beneficiaries are not made aware of the Social Security work incentives, which are intended to encourage them to return to work. The Commission's recommendations in this area are intended to provide additional incentives to individuals who desire to move from reliance on Social Security benefits to be self-sufficient.

Chapter 3: Judicial Trends in ADA Enforcement

In a series of decisions rendered after the Commission's hearing, the Supreme Court both obscured the nation's vision for the ADA as expressed by Congress and refused to give deference to the extensive guidance issued by the federal agencies charged by Congress with enforcing the ADA. These decisions significantly curtailed the coverage of the ADA. These decisions will not only cause unnecessary litigation, but most importantly will also leave many individuals with disabilities intended to be covered by the ADA without legal recourse. For example, based upon the Supreme Court majority's myopic view of the ADA, individuals who were clearly intended to be covered by the ADA—individuals with conditions like epilepsy, diabetes, and cancer—are being denied their day in court. The Commission sees no other recourse but for Congress to reaffirm the meaning and intent of the ADA and to clarify the intended coverage of the law.

The Supreme Court decision in another significant ADA case recognized the conflict in purposes between the ADA and the Social Security Act and held that individuals are not automatically barred from suing under the ADA simply because they claimed an inability to work in an application for Social Security disability benefits. Despite recognizing the difference in purpose between the ADA and the Social Security Act, the court still allows employ-

ers to demand an explanation from individuals for the basis of their claim for disability benefits. This, unfortunately, invites continued litigation over this issue.

Chapter 4: Substance Abuse under the ADA

The Commission also heard testimony on the issue of substance abuse and the ADA. The social and economic costs of substance abuse in America are staggering. It is estimated that the cost of alcohol and drug abuse for 1995 was $276.4 billion—$166.5 billion for alcohol abuse and $109.8 billion for drug abuse. The ADA, however, currently does not mandate that private industry offer programs, such as employee assistance programs (EAPs), to assist workers with substance abuse problems. In an effort to curtail these wasted costs and balance the legitimate interests of employers, the Commission recommends that information be made available to employers by EEOC and DOJ on the economic benefits that are derived from establishing EAPs or similar programs. As important as education, the Commission also believes Congress should provide appropriate tax incentives for the establishment of EAPs and similar programs within private industry.

Testimony at the ADA hearing also showed that employers and courts struggle with the ADA's definition of "current" drug user. This is an important issue because current users are expressly excluded from ADA protection. The EEOC's interpretive guidance and discussion in its technical assistance manual, which requires a case-by-case analysis of current use, while helpful, does not set forth any definitive standards under which an employer can make this interpretation. Here the Commission recommends that EEOC, after consulting with stakeholders, offer specific and detailed guidance in defining what is a current drug user.

Chapter 5: Psychiatric Disabilities and the ADA

A final area examined at the ADA hearing was the ADA's coverage of psychiatric and mental disabilities. Those testifying explained that the ADA initially focused on accommodating individuals with physical disabilities, with individuals with psychiatric disabilities largely ignored until discrimination charges based on mental impairments became the largest source of ADA charges filed with the EEOC. At the time of the Commission's ADA hearing, the EEOC's psychiatric enforcement guidance had just been issued. The issuance of these guidelines sparked a national media firestorm highlighted by editorials painting nightmarish scenarios of manipulative substandard employees, headlines such as "employers are terrified," and cartoons of a "Nightmare on Elm Street" type character, as applicants protected by the ADA. As usual, hindsight is 20/20 and these concerns were unfounded. In fact, as the Commission report discusses, employers were subject to almost similar disability requirements under the 1973 Rehabilitation Act. Instead of Freddy Kruger wreaking havoc on employers, EEOC's psychiatric enforcement guidance provides useful guidance and examples of how the ADA should work for employers confronting employment-related issues involving individuals with psychiatric disabilities. Equally important, these guidelines are being relied upon by employers and the courts.

The Supreme Court in another ADA case recognized that "unjustified isolation" of individuals with disabilities in institutions is unlawful discrimination. The Commission report explains that this goal of the ADA with respect to individuals with mental disabilities is best summarized by the Department of Justice (DOJ) regulations mandating that public entities administer services, programs, and activities that place individuals with mental disabilities in the most integrated settings appropriate for their needs. These regulations were validated by the Supreme Court, which established standards by which public entities must provide for the integration of individuals with mental disabilities into community-based settings. While state and local agencies now express an intent to work toward the integration of individuals with mental disabilities into society, the Commission report concludes that state and local governments generally have not committed the personnel resources or the funds necessary to

integrate individuals with mental disabilities or multiple disabilities, which include mental disabilities, into society in a manner that is truly meaningful and productive.

To accomplish this goal of integration into the community, the Commission urges DOJ, SSA, and other federal agencies to promulgate regulations that complement each other and in turn force public entities to establish written policies that have clear, objective, and fair standards by which individuals with mental disabilities may be integrated into community-based settings that are most appropriate for their needs.

The Commission report also recognizes that law enforcement departments across the nation have taken strides toward improving the services provided to individuals with disabilities who are both the victims and suspects of crime. Even with this work, problems remain in the interactions between police and individuals with mental disabilities. Some law enforcement departments have worked toward complying with the ADA with respect to individuals with mental disabilities by providing training classes and training videotapes. To fully succeed in this area, the Commission recommends that Congress provide additional funding to DOJ to allow it to increase its technical assistance tools, including offering nationwide training of officers in how to interact with individuals with mental disabilities. This training should include how to recognize, approach, and interact with individuals with mental disabilities and should include videos and simulations developed in conjunction with disability advocacy groups.

Findings and Recommendations

The final chapter of this report provides a series of recommendations aimed at addressing issues interfering with accomplishing the ADA vision and preventing individuals with disabilities from truly becoming part of the fabric of this society. These recommendations are balanced and run the gamut from increased education, to more focused enforcement of the ADA by the federal agencies charged with enforcing the ADA, to tax breaks for businesses that proactively embrace the ADA, to congressional action needed to reconfirm the statute's intent and vision.

When the ADA was signed into law, it was proclaimed, "Together, we must remove the physical barriers we have created and the social barriers that we have accepted. For ours will never be a truly prosperous nation until all within it prosper."[1] Ten years after its enactment, those words remain true. Together we must all continue this effort. This report is but one step in the direction of sharing the dream and accommodating all!

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[1] President George Bush's Remarks on Signing the Americans with Disabilities Act of 1990, *Public Papers of the Presidents of the United States, George Bush* (Washington D.C.: National Archives and Records Administration, 1990), book 2, p. 1071.

Introduction

The U.S. Commission on Civil Rights (Commission) held a public hearing on the Americans with Disabilities Act (ADA) on November 12–13, 1998, in Washington, D.C.[1] The Commission originally analyzed disability discrimination in its 1983 report, *Accommodating the Spectrum of Individual Abilities*.[2] This report recognized that "there are spectrums of physical and mental abilities that range from superlative to minimal or nonfunctional."[3] *Accommodating the Spectrum* was instrumental in bringing the "spectrum of abilities" concept into the mainstream of disability rights analysis.[4] The Commission's report noted that the "handicapped-normal dichotomy"[5]—meaning there are "normal" people who can participate fully in society and there are people with physical and mental disabilities who cannot—"is the wellspring of handicap discrimination."[6] The 1983 report made the following official finding:

> Historically, society has tended to isolate and segregate handicapped people. Despite some improvements, particularly in the last two decades, discrimination against handicapped persons continues to be a serious and pervasive social problem. It persists in such critical areas as education, employment, institutionalization, medical treatment, involuntary sterilization, architectural barriers, and transportation.[7]

When the ADA was enacted in 1990, it was considered a landmark statute. It marked the first comprehensive equal opportunity law for individuals with disabilities. Its intent is "to ensure that people with disabilities are given the basic guarantees for which they have worked so long and so hard: independence, freedom of choice, control of their lives, the opportunity to blend fully and equally into the rich mosaic of the American mainstream."[8] Specifically, the ADA ensures (1) employers covered by the act cannot discriminate against qualified individuals with disabilities; (2) access to public accommodations and government services; (3) expanded access to transportation services; and (4) equivalent telephone services for people with speech or hearing impairments.[9]

The purpose of the Commission's 1998 hearing was to investigate how the ADA was accomplishing its objective. The hearing was timely because there was significant discord among the federal Courts of Appeals regarding the impact of the ADA. There were also developing controversies as to the impact of an application for disability benefits on a person's right to pursue an ADA claim, including whether blanket employment policies discriminating against whole classes of individuals with disabilities could be justified under the ADA; whether ADA's nondiscrimination requirement mandated community

[1] Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213 (1994)).

[2] U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, 1983 (hereafter cited as Commission, *Accommodating the Spectrum*).

[3] Ibid., p. 87.

[4] Robert L. Burgdorf Jr., *Disability Discrimination in Employment Law* (Washington, D.C.: Bureau of National Affairs, 1995) p. 2.

[5] The term "handicapped" is used here because that was the term used in the Commission's 1983 report.

[6] Commission, *Accommodating the Spectrum*, pp. 93–94.

[7] Ibid., p. 159.

[8] President George Bush's Remarks on Signing the Americans with Disabilities Act of 1990, *Public Papers of the Presidents of the United States, George Bush* (Washington D.C.: National Archives and Records Administration, 1990), book 2, p. 1068.

[9] 42 U.S.C. §§ 12101–12213.

versus institutionalized treatment for some individuals with disabilities; and whether the definition of disability included consideration of mitigating measures. The ADA was being heavily litigated, which, in effect, created more questions about the act's intent and scope.

The Commission agreed to hear testimony on disability issues that were current and to some extent controversial, so that the Commission could meaningfully contribute to the national discourse on the ADA. The hearing topics were neither exhaustive nor demonstrative of the many ADA-related issues that warrant national attention. As the chairperson of the Commission, Mary Frances Berry, emphasized, "the resulting topics in no way reflect a diminishing of our interest in or commitment to equal rights for the disability community in all facets of American life."[10] Because some of the issues are not as heavily disputed as they were at the time of the hearing, they are not included in this report.

Shortly following the hearing, the Supreme Court rendered several decisions interpreting the ADA, some directly addressing issues discussed by panelists. In the interest of producing a current and useful report, Commission staff has provided a summary of these decisions. In addition, as the hearing was being planned, a central issue was whether an asymptomatic HIV positive person was entitled to protection under the ADA. There was substantial litigation surrounding this issue because a person infected with HIV has not developed the most serious symptoms related to HIV infection. Indeed, an entire hearing panel was dedicated to the issue of AIDS/HIV and the ADA. Prior to the hearing, the Supreme Court in *Bragdon v. Abbott*[11] determined that HIV infection was a covered disability under the ADA.[12] In light of the Supreme Court's unequivocal ruling, and despite the fact that this issue was the substance of testimony before the Commission, the topic of AIDS/HIV and the ADA is not addressed in this report.

The panelists testifying at the hearing provided valuable insight on their topics. The Commission appreciates the time and effort expended by all the panelists in helping produce an informative hearing and this report.

In the chapter that follows is a summary of the history of disability policy and the events leading to the ADA. Since the act's provisions became effective, there has been ongoing disagreement over the success of the ADA and whether it has accomplished its mandate. Chapter 2 highlights the practical effects of the ADA on individuals with disabilities and businesses. The recent Supreme Court decisions and the flood of ADA cases in the lower courts warrant a discussion on the judicial trends in ADA enforcement, discussed in chapter 3. Substance abuse and the ADA is a critical issue as some companies have implemented hiring policies that discriminate against former substance abusers, who are typically covered under the ADA. Chapter 4 addresses issues surrounding these types of policies and the ADA coverage of substance abusers. Chapter 5 discusses psychiatric disabilities, a topic that has received much attention because of the increasing prevalence of these disabilities and the recent Supreme Court decision banning unjustified segregation of persons with psychiatric and mental disabilities. The final chapter sets forth the Commission's findings and recommendations.

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[10] Opening Remarks of Mary Frances Berry, chairperson, U.S. Commission on Civil Rights, Americans with Disabilities Hearing, Washington, D.C., Nov. 12–13, 1998, p. 2.

[11] Bragdon v. Abbott, 118 S. Ct. 2196 (1998).

[12] *Id.* at 2201.

CHAPTER 1

The Road to the ADA

Together, we must remove the physical barriers we have created and the social barriers that we have accepted. For ours will never be a truly prosperous nation until all within it prosper.[1]

On July 26, 1990, President George Bush signed the Americans with Disabilities Act into law.[2] The ADA provides a host of civil rights protections for individuals with disabilities. The law seeks to ensure for people with disabilities rights such as equal opportunity in employment,[3] full accessibility to government services,[4] public accommodations,[5] telecommunications;[6] and meaningful methods of enforcing those rights.[7] These rights were not always provided, but they have evolved over time.

Evolution of a National Disability Policy

Images of the disabled as either less or more than merely human can be found throughout recorded history. There is the blind soothsayer of ancient Greece, the early Christian belief in demonic possession of the insane, the persistent theme in Judeo-Christian tradition that disability signifies a special relationship with God. The disabled are blessed or damned but never [wholly] human.[8]

Historically, in a culture that values a strong mind and body, people with disabilities were viewed by some as deficient and inferior.[9] In colonial America, persons with disabilities were seen as part of the "deserving poor" and were accepted by their communities.[10] But with the 19th century industrial and market revolution, individuals with disabilities were deemed unable to compete in America's industrial economy and were consequently spurned from society.[11] Early historical accounts describe killing and abandoning "imperfect" children and adults.[12] People with disabilities were considered weak and unable to contribute to the welfare of the community.[13] Sometimes, they were thought to possess supernatural powers or to be under the influence of Satan.[14] In short, "[t]he history of society's formal methods of dealing with handicapped people can be summed up in two words: segregation and inequality."[15]

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[1] President George Bush's Remarks on Signing the Americans with Disabilities Act of 1990, *Public Papers of the Presidents of the United States, George Bush* (Washington D.C.: National Archives and Records Administration, 1990), book 2, p. 1071 (hereafter cited as President Bush's Signing Statement).

[2] Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213 (1994)).

[3] 42 U.S.C. §§ 12111–12117.

[4] 42 U.S.C. §§ 12131–12165.

[5] 42 U.S.C. §§ 12181–12189.

[6] 47 U.S.C. § 225 (1994).

[7] 42 U.S.C. §§ 12117, 12133, 12188.

[8] Matthew Diller, "Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs," *Texas Law Review*, vol. 76 (1998), p. 1013 (citing Alan Gartner and Tom Joe, eds., *Images of the Disabled, Disabling Images*, 1987, p. 2).

[9] Jonathan C. Drimmer, "Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities," *UCLA Law Review*, vol. 40 (1993), pp. 1341, 1343 (hereafter cited as Drimmer, "Cripples, Overcomers").

[10] National Council on Disability, *Equality of Opportunity: The Making of the Americans with Disabilities Act*, 1997, p. 5 (hereafter cited as NCD, *Equality of Opportunity*).

[11] Ibid.

[12] Drimmer, "Cripples, Overcomers," p. 1359.

[13] Ibid.

[14] Ibid.

[15] Ibid. (citation omitted).

Before the ADA, most of the nation's disability policies were premised on what has been termed a "medical" or "charity" model of disability.[16] In essence, disability laws were enacted to rehabilitate individuals with disabilities because of their perceived inferiority and deficiencies.[17] The primary motivation for rehabilitating people with disabilities was to increase national production and decrease welfare spending.[18] Once these individuals were rehabilitated, they were hired to perform menial jobs in sheltered workshops.[19] In the 1970s and 1980s, however, the public and Congress began to change their perceptions of individuals with disabilities.[20] Following the civil rights movement and protests by persons with disabilities, access to mainstream America was recognized as a fundamental right deserved by all, including persons with disabilities.[21] The focus of legislation for individuals with disabilities shifted from rehabilitation to promotion of their civil rights.[22] Congress moved away from the medical/charity model and incorporated a civil rights model by enacting legislation for people with disabilities.[23]

Medical/Charity Model

The basic principle underlying the medical/charity model is that a disability is an infirmity that can only be properly addressed by doctors and rehabilitation professionals who attempt to "cure" or "fix" the person with a disability.[24] According to this model, the problem of disability resided in the individual, who must be rehabilitated and returned to gainful employment.[25]

The trend in America during the 19th century was to rehabilitate individuals with disabilities to facilitate their entry or re-entry into the work force.[26] Originally, many of these vocational programs were sponsored by charitable organizations, such as the Salvation Army and the Red Cross, whose primary concern was to provide therapeutic treatment and secure employment for persons with disabilities.[27] As a result of these charitable efforts, people with disabilities were placed in sheltered workshops that employed persons with disabilities exclusively.[28] Because charitable groups influenced the formation of the first vocational rehabilitation act, many believed that the services provided under it were based upon federal charity.[29] In the public's view, this charitable congressional act made nonproductivity by persons with disabilities inexcusable.[30] A 1945 publication noted, "With these comprehensive rehabilitation services, if an individual with a disability 'remains at a disadvantage . . . it will be the fault of that man and his family and his community, in failing to take advantage of the abundance that is provided.' "[31]

Following the rise of a mechanized society and the resulting high incidence of workplace injuries, the states and the federal government began providing vocational training to injured workers.[32] Initially, states offered financial compensation as well as medical treatment for injuries sustained on the job, but employees with serious injuries required more comprehensive assistance.[33] Thus, restoration of these injured workers to some form of remunerative employment became a national priority.[34] As states enacted legislation to implement vocational rehabilitation programs for injured workers, there was a mass return of injured veterans from World War I.[35] These events prompted Congress to believe that national laws were necessary to govern the rehabilitation of individuals with disabilities,[36] leading to the following laws:

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[16] Ibid., pp. 1345–48, 1355–59.

[17] Ibid., p. 1348.

[18] Ibid., pp. 1361, 1368.

[19] Ibid., pp. 1361, 1366–67.

[20] Ibid., pp. 1358–59.

[21] Ibid., pp. 1375–76.

[22] Ibid., p. 1379.

[23] Ibid., p. 1358. The civil rights model pursues equality of opportunity, through securing access to, and independence in, all aspects of society. Ibid.

[24] Ibid., p. 1347.

[25] Ibid., pp. 1349, 1365.

[26] Ibid, p. 1361.

[27] Ibid.

[28] Ibid.

[29] Ibid., p. 1366.

[30] Ibid.

[31] Ibid., n. 111 (citing Edna Yost and Lillian M. Gilbreth, *Normal Lives for the Disabled*, 1945, p. 72).

[32] Ibid., p. 1362.

[33] Ibid.

[34] Ibid.

[35] Ibid., p. 1363.

[36] Ibid.

Smith-Sears Act

This law was enacted in 1918 "to provide for vocational rehabilitation and return to civil employment of disabled persons discharged from the military or naval forces."[37] The act was designed to help the veteran with a disability overcome his disability and seek competitive employment.[38]

Smith-Fess Act

This act was signed into law in 1920 by President Woodrow Wilson as the first federal civil vocational rehabilitation act for individuals with disabilities who were not war veterans.[39] The purpose of this act was to provide vocational training, job placement, and counseling by trained professionals to persons who, "by reason of a physical defect or infirmity, whether congenital or acquired by accident, injury, or disease [are], or may be expected to be, totally or partially incapacitated."[40] The act covered congenital disabilities, a condition not covered in its predecessor—the Smith-Sears Act. The fact that people born with disabilities, not just injured war veterans, were covered under the act illustrated Congress' beginning appreciation for all people with disabilities. At the same time, however, the absence of a provision regarding societal discrimination in the language of the bill underscores the continued belief that the lack of participation of people with disabilities in employment and other areas was due to their limited capabilities.[41]

Randolph-Sheppard Vending Stand Act

The Randolph-Sheppard Vending Stand Act authorized blind people to operate vending stands on federal property in order to become self-sufficient and to enlarge the "opportunities of the blind."[42] While the act provided employment for persons with disabilities, they still were not being integrated into the competitive work force.[43] Rather, they were provided jobs without opportunity for promotion or use of skills.[44] According to one legal commentator, the act reinforced the view of federal charity, as the government provided the equipment and allowed blind vendors to sell their merchandise on federal property.[45]

Civil Rights Model

The civil rights model is based largely on the civil rights movement of the 1950s and 1960s and views society, rather than the individual with a disability, as defective.[46] This model "pursues a 'level playing field,' or equality of opportunity, through aggressively securing access to, and independence in, all aspects of society."[47] The passage of the Civil Rights Act of 1964,[48] which prohibited discrimination based on race, color, religion, national origin, and sex, was a major inspiration for the concept of similar protection for people with disabilities.[49] Generally, the 1964 act prohibits discrimination in public accommodations,[50] federally funded programs,[51] and employment.[52] Although the act was instrumental in guaranteeing civil rights to minorities and women, there was no reference to persons with disabilities. Consequently, a disability rights movement developed in the tradition of the 1960's social movements.[53] Persons with disabilities pushed the need for their own civil rights law to the forefront of the legislative arena and in the minds of the American public. Slowly there was a shift away from the medi-

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[37] Ch. 107, 40 Stat. 617 (1918) (amended 1919)).

[38] Drimmer, "Cripples, Overcomers," p. 1364 (citing Act of July 11, 1919, ch. 12, 41 Stat. 158, 159 (1919)).

[39] Ch. 219, 41 Stat. 735 (1920) (codified as amended at 29 U.S.C. §§ 731–741 (repealed 1973, and re-enacted in the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355)).

[40] Act of June 2, 1920, 41 Stat. 735.

[41] Drimmer, "Cripples, Overcomers," p. 1365.

[42] Randolph-Sheppard Act, ch. 638, 49 Stat. 1559 (1936) (codified as amended at 20 U.S.C. § 107 (1994)).

[43] Drimmer, "Cripples, Overcomers," p. 1366.

[44] Ibid., p. 1367.

[45] Ibid.

[46] Ibid., p. 1355.

[47] Ibid., p. 1358.

[48] Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C. (1994)).

[49] Robert L. Burgdorf Jr., *Disability Discrimination in Employment Law* (Washington, D.C.: Bureau of National Affairs, 1995), p. 26 (hereafter cited as Burgdorf, *Disability Discrimination*). Robert L. Burgdorf Jr. was one of the original authors of the Americans with Disabilities Act and is professor of law at David A. Clarke School of Law, University of the District of Columbia.

[50] 42 U.S.C. § 2000a (1994).

[51] 42 U.S.C. § 2000d (1994).

[52] 42 U.S.C. § 2000e (1994).

[53] NCD, *Equality of Opportunity*, p. 21.

cal/charity model to the civil rights model in drafting legislation for individuals with disabilities.

As part of this new movement, the concept of "independent living" for individuals with disabilities was championed. A small group of students with disabilities at the University of California at Berkeley inspired this concept, as they tried to develop resources and supports to enable themselves to live independently in the community.[54] At the core of the independent living philosophy is a conviction that people with disabilities "desire to lead the fullest lives possible, outside of institutions, integrated into the community, exercising full freedom of choice."[55] The concept has been incorporated into a number of federal statutes.[56] In fact, the traditional rehabilitation statutes have been restructured to encompass a wide range of independent living services not limited to vocational and employment goals.[57] These services range from information and referral services to mobility training, transportation, and social and recreation services.[58] In order to provide these services, federal statutes mandate local centers for independent living and statewide independent living councils in each state.[59]

Litigation

Initially, there were sporadic, unsuccessful attempts to remedy alleged disability discrimination through court litigation. For example, in 1965, a schoolteacher sued the New York City public school system after he was excluded from a teaching position because of his blindness.[60] The New York state court ruled the school board was authorized to disqualify teaching applicants based on vision requirements.[61]

During the late 1960s and early 1970s, complainants were more successful in challenging discrimination against people with disabilities. In 1969, a Utah court applied the principles of equal educational opportunity established in *Brown v. Board of Education*[62] to people with disabilities, holding that the exclusion of two mentally retarded children from the Utah public schools was unconstitutional.[63] This decision sparked a nationwide onslaught of similar lawsuits, including claims of disability discrimination in transportation, guardianship, housing, medical services, sterilization, contracts, voting, and confinement in residential treatment facilities.[64]

In 1985, the Supreme Court handed down a pivotal decision in *Cleburne v. Cleburne Living Center, Inc.*[65] In determining whether a state zoning ordinance could legally exclude a group home for persons with mental retardation, the Supreme Court held that the ordinance was unconstitutional.[66] The Court, however, did not find individuals with disabilities were a "quasi suspect class"; instead, it applied the minimum level of judicial scrutiny for an equal protection analysis: state legislation must only be rationally related to a legitimate governmental purpose.[67] The Court recognized that individuals with mental retardation are "different, immuta-

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[54] Burgdorf, *Disability Discrimination*, p. 12.

[55] Ibid., p. 13.

[56] *See, e.g.*, the Americans with Disabilities Act, 42 U.S.C. § 12101(a)(8); the Rehabilitation Act, 29 U.S.C. §§ 701(a)(3)(A), 701(a)(4), 701(a)(6)(B), 701(b)(1)–(2), and 796f-4; and the Individuals with Disabilities Education Act, 20 U.S.C. § 1401(c).

[57] Burgdorf, *Disability Discrimination*, pp. 12–13.

[58] Ibid., p. 13.

[59] Ibid.

[60] Chavich v. Bd. of Exam'rs, 23 A.D.2d 57 (N.Y. App. Div. 1965).

[61] *Id.* at 60–61.

[62] 349 U.S. 294 (1954).

[63] Burgdorf, *Disability Discrimination*, p. 24 (citing Wolf v. State Legislature, Civ. No. 182646 (3d Judicial Dist., Salt Lake County, Utah, Jan. 8, 1969)).

[64] Ibid., p. 25.

[65] 473 U.S. 432 (1985).

[66] Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985).

[67] *Id.* at 446. The Equal Protection Clause of the 14th Amendment directs that all persons similarly situated should be treated alike. *Id.* at 439. State legislation or other official action that is challenged as denying this right is presumed to be valid and will be sustained if the classification drawn by the statute is "rationally related" to a legitimate state interest. *Id.* at 440. This general rule does not apply when a statute classifies by race, alienage, or national origin. *Id.* These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy. *Id.* Therefore, laws that classify based on race, alienage, or national origin are subject to "strict scrutiny" and will be sustained only if they are suitably tailored to serve a compelling state interest. *Id.* Gender and illegitimacy, also known as "quasi suspect," are also subject to a heightened standard of review. *Id.* Official discrimination resting on gender or illegitimacy fails unless it is substantially related to a sufficiently important governmental interest. *Id.* at 441.

bly so, in relevant respects,"[68] but concluded that laws distinguishing between persons with mental retardation and others are not subject to heightened scrutiny by the judiciary.[69]

Most disability discrimination cases were brought under the due process and equal protection guarantees of the United States Constitution, and any success was limited to government-sanctioned discrimination. Private discrimination remained and could not be judicially challenged.[70]

Legislation Providing Access to Public Benefits

Although attempts to amend the Civil Rights Act of 1964 to address disability discrimination were unsuccessful, other federal nondiscrimination measures on behalf of people with disabilities were enacted from the late 1960s to the 1980s. This section highlights some of the key legislation passed during this period to attempt to provide individuals with disabilities access to all facets of community life.

Architectural Barriers Act of 1968

One of the first pieces of disability legislation incorporating a civil rights approach was the Architectural Barriers Act of 1968.[71] The act required that all new facilities built with public money or those newly renovated be accessible to people with disabilities.[72] The law applied only to new facilities owned or leased by the federal government.[73] Existing facilities were not affected and most remained inaccessible to people with disabilities. Furthermore, the act contained no provisions for enforcement, and compliance by federal agencies was inconsistent.[74] To help ensure compliance, in 1973, Congress created the Architectural and Transportation Barriers Compliance Board (Access Board).[75] In 1978, the Access Board was given authority to establish minimum guidelines and requirements for federal accessibility standards.[76] The Access Board jointly, with other federal agencies, issued Uniform Federal Accessibility Standards, which established a single set of standards for accessibility to all buildings subject to the act's requirements.[77]

Individuals with Disabilities Education Act

In response to the long history of segregation and exclusion of children with disabilities from the American public school system, Congress enacted the Education for All Handicapped Children Act (EAHCA) in 1975.[78] In 1990, the EAHCA was renamed the Individuals with Disabilities Education Act (IDEA).[79] The 1990 law set forth a comprehensive scheme for ensuring two basic substantive rights of eligible children with disabilities: (1) the right to a free appropriate public education,[80] and (2) the right to that education in the least restrictive environment.[81] The act provides federal grants for state and local education agencies on the condition that they meet these two principal criteria and others enumerated in the act.[82] The IDEA was reauthorized and amended in 1997 to clarify and strengthen the act's provisions.[83] For instance, the new emphasis of the law focuses on strengthening the role of parents, ensuring access to the general education curriculum and reforms, and giving increased attention to racial, ethnic, and linguistic diversity to prevent inap-

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[68] *Id.* at 442.

[69] *Id.* at 442–47. Following enactment of the ADA, some have argued that classifications based on disability should be subject to heightened review by the courts. *See, e.g.*, Heller v. Doe, 509 U.S. 312 (1993) (Souter, J., dissenting) (stating that laws that discriminate against individuals with mental retardation are subject to heightened review).

[70] Burgdorf, *Disability Discrimination*, p. 25.

[71] Pub. L. No. 90-480, 82 Stat. 718 (1968) (codified as amended at 42 U.S.C. §§ 4151–4157 (1994)).

[72] 42 U.S.C. § 4155.

[73] 42 U.S.C. § 4151.

[74] Drimmer, "Cripples, Overcomers," p. 1378.

[75] 29 U.S.C. § 792 (1994).

[76] 29 U.S.C. § 792(b)(7) *amended by* 29 U.S.C. § 792(b)(3)(A) (1994 and Supp. IV 1998).

[77] Burgdorf, *Disability Discrimination*, p. 28 (citing 49 Fed. Reg. 33,864 (1982)).

[78] Pub L. No. 94-142, 89 Stat. 775 (1975) (codified at 20 U.S.C. §§ 1232, 1401, 1405–1420, and 1453 (1994)). Section 1453 was subsequently repealed.

[79] Pub. L. No. 101-476, 901(a)(2) and (3), 104 Stat. 1142 (1990) (codified as amended at 20 U.S.C. §§ 1400–1485 (1994 & Supp. IV 1998)).

[80] 20 U.S.C. § 1412(a)(1) (Supp. IV 1998).

[81] 20 U.S.C. § 1412(a)(5)(A) (Supp. IV 1998).

[82] 20 U.S.C. § 1412.

[83] Pub. L. No. 105-17, 111 Stat. 37 (1997) (codified at 20 U.S.C. §§ 1401–1420 (1994)). The authorization of appropriations for IDEA programs extends through fiscal year 2002.

propriate identification and mislabeling of students.[84] In its January 2000 report, *Back to School on Civil Rights*, the National Council on Disability (NCD) found that over the past 25 years states have not met their general supervisory obligations to ensure compliance with the core civil rights requirements of the IDEA.[85] In addition, the NCD found that federal efforts to enforce the law have been inconsistent and ineffective.[86]

Developmental Disabilities Assistance and Bill of Rights Act of 1975

This act provides federal funding for care and treatment programs for people who are considered to have "developmental disabilities."[87] Pursuant to the act, a "developmental disability" is a severe life-long disability that manifested before age 22, impairs the functioning of a major life activity, and necessitates extended care or treatment.[88] The act is unique in that it includes a "Developmental Disabilities Bill of Rights,"[89] which declares that people with developmental disabilities have "a right to appropriate treatment, services, and habilitation" that "maximize the developmental potential of the individual and . . . [that provide] . . . the setting that is least restrictive of the individual's personal liberty."[90] Contrary to the language of the bill, the aforementioned rights were declared unenforceable by the Supreme Court and, therefore, not directly binding on states.[91] The declaration of rights does, however, represent Congress' clear preference for the types of services to be provided and the manner in which they should be provided to individuals with developmental disabilities.

Civil Rights of Institutionalized Persons Act of 1980

This act authorizes the U.S. Attorney General to investigate conditions of confinement of a state or a political subdivision thereof, such as state mental institutions, publicly operated nursing homes, jails, and juvenile detention centers.[92] The act's purpose is to uncover "egregious or flagrant conditions . . . causing . . . persons to suffer grievous harm."[93] Furthermore, such conditions must be "pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities [protected by the Constitution and other federal laws]."[94] If the Attorney General has reasonable cause to believe that the act has been violated, he or she may initiate a civil suit.[95]

Air Carrier Access Act of 1986

This act amended the Federal Aviation Act to prohibit discrimination against people with disabilities by all air carriers.[96] The act received attention after the National Council on Disability issued a February 1999 report on the overall enforcement of civil rights laws for air travelers with disabilities.[97] The NCD found that the act was ineffective, that public education efforts on the needs and legal rights of air travelers with disabilities were inadequate, and that there was not enough money or staff at the Department of Transportation dedicated to investigating complaints.[98] Although the report recognized improvements in airline access since the act's creation, it noted that air travelers with disabilities continue to encounter frequent, significant discrimination.[99]

Voting Accessibility for the Elderly and Handicapped Act of 1984

This statute was designed to improve access for elderly people and individuals with disabilities at registration facilities and polling places

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[84] U.S. Congress, Committee on Education and the Workforce, *Individuals with Disabilities Education Act*, 105th Cong., 1st sess., 1997, H. Rept. 105-95, at 85, *reprinted in* 1997 U.S.C.A.A.N. 78, 82.

[85] National Council on Disability, *Back to School on Civil Rights*, 2000, p. 10. The report looked at more than two decades of federal monitoring and enforcement of Part B of the IDEA.

[86] Ibid.

[87] 42 U.S.C. § 6000(b)–(c) (1994).

[88] 42 U.S.C. § 6001(8)(A)–(E).

[89] 42 U.S.C. § 6009.

[90] 42 U.S.C. § 6009(1)–(2).

[91] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 11–32 (1981).

[92] 42 U.S.C. §§ 1997(1), 1997a (1994).

[93] 42 U.S.C. § 1997a.

[94] 42 U.S.C. § 1997a.

[95] 42 U.S.C. § 1997a.

[96] 49 U.S.C. § 1374(c) (1994).

[97] National Council on Disability, *Enforcing the Civil Rights of Air Travelers with Disabilities: Recommendations for the Department of Transportation and Congress*, 1999.

[98] Ibid., pp. 9–13.

[99] Ibid., pp. 92–97.

for federal elections.[100] Pursuant to the act, political subdivisions must ensure that a reasonable number of accessible voter registration facilities exist; and that registration and voting aids are available, including posting voting instructions in large print and providing telecommunications devices for the hearing impaired.[101]

Fair Housing Amendments Act of 1988

These amendments expanded the enforcement provisions of Title VIII of the Civil Rights Act of 1968[102]—often referred to as the Fair Housing Act—to prohibit discrimination based on race, color, religion, and national origin when selling or renting private housing. The Fair Housing Amendments Act (FHAA) is one of the first major, substantive federal civil rights laws to prohibit discrimination on the basis of a disability by private entities.[103] The act establishes a requirement that housing providers make "reasonable accommodations" in rules, policies, practices, or services when necessary to afford a person with a disability an equal opportunity to use and enjoy housing.[104] The FHAA also provides that a person with a disability cannot be prohibited from making reasonable modifications in a dwelling at his or her own expense if it is necessary for full enjoyment of the premises.[105]

Legislation Providing Employment Opportunities as a Civil Right

Earning wages is essential to feelings of pride, self-confidence, and independence. The employment of individuals with disabilities enriches the lives of those employed, and it benefits society to have an infusion of workers with various skills and talents. Over the years, Congress has become increasingly aware that to truly increase the employment of people with disabilities, efforts have to extend beyond rehabilitation. While there is a well-established system to support people with disabilities in dependency, there is relatively little support for their efforts to be independent. Following is a list of key legislation that exemplifies this essential shift from fostering dependency to promoting independence in all facets of life, particularly in employment.

Rehabilitation Act of 1973

In response to the growing notion that people with disabilities had a civil right to social participation, Congress sought to extend the Vocational Rehabilitation Act[106] beyond its traditional employment focus by identifying ways to improve the overall lives of persons with disabilities.[107] The new law's purpose was to extend rehabilitation to all persons with disabilities, provide for extensive research and training for rehabilitation services, and coordinate federal disability programs.[108] More importantly, the act would include a nondiscrimination provision and mandate to every federal agency to establish an affirmative action plan to encourage the hiring, placement, and promotion of individuals with disabilities.[109]

After passing the Congress twice and being vetoed by President Nixon each time, the act was finally signed into law on September 26, 1973.[110] Although the act fell short of original congressional intent, it proved to be a significant law for people with disabilities.[111] In addition to continuing the federal vocational rehabilitation program, the Rehabilitation Act of 1973 included several new initiatives designed to expand rights and opportunities for people with disabilities.

Patterned generally after Title VI of the Civil Rights Act of 1964[112] and the proposed

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[100] 42 U.S.C. §§ 1973ee–1973ee-6 (1994).

[101] 42 U.S.C. §§ 1973ee-2(a)–3(a). In 1993, the National Voter Registration Act expanded registration opportunities for eligible persons with disabilities. 42 U.S.C. § 1973gg-5 (1994). The act enables individuals with disabilities to vote at social service agencies where they receive state-funded benefits. 42 U.S.C. § 1973gg-5(a)(2)(B).

[102] 42 U.S.C. §§ 3601–3631 (1994).

[103] 42 U.S.C. §§ 3602, 3604. The Fair Housing Act was amended in 1974 to proscribe discrimination on the basis of sex. *See* Housing and Community Development Act of 1974, § 88(b), 88 Stat. 729. It was again amended in 1988 to include disability and family status. *See* 42 U.S.C. § 3602(k) 1994.

[104] 42 U.S.C. § 3604(f)(3)(B).

[105] 42 U.S.C. § 3604(f)(3)(A).

[106] The act is also known as the Smith-Fess Act.

[107] NCD, *Equality of Opportunity*, pp. 12–13.

[108] 29 U.S.C. § 701 (1994 & Supp. IV 1998).

[109] 29 U.S.C. §§ 791, 794 (Supp. IV 1998).

[110] Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. §§ 701–797 (1994 & Supp. IV 1998)).

[111] NCD, *Equality of Opportunity*, p. 13.

[112] 42 U.S.C. § 2000d (1994).

1971 amendment to the Civil Rights Act,[113] Section 504 of the Rehabilitation Act states that "[n]o otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[114] According to one disability historian, Richard K. Scotch, this section "transformed federal disability policy by conceptualizing access for people with disabilities as a civil right rather than as a welfare benefit"[115]—a concept rejected in the previous year when legislators fought to include disability as a prohibited ground for discrimination under Title VI.

The purpose of the remaining sections of the Rehabilitation Act is to further equal rights for individuals with disabilities. Section 501 requires affirmative action hiring and advancement programs for federal agencies.[116] Section 503 places an analogous duty on federal government contractors and requires businesses having federal contracts of $10,000 or more to affirmatively hire and advance qualified individuals with disabilities.[117] Pursuant to Section 502, the Architectural and Transportation Barriers Compliance Board (Access Board) was established.[118] The Access Board issued guidelines for accessible designs and through its subsidiary agencies, a uniform set of standards for accessibility of all buildings subject to the act's requirements was issued.[119] To ensure compliance with these guidelines, the Access Board brings administrative actions and lawsuits and conducts studies.[120]

The Department of Health, Education, and Welfare (HEW) was responsible for issuing regulations to interpret and implement Section 504.[121] Prior to implementation of the regulations, Congress enacted the Rehabilitation Act Amendments of 1974,[122] a series of amendments clarifying the new law. Most importantly, the amendments used a new civil rights-oriented definition for a handicap or disability. In recognizing that people with disabilities face attitudinal and physical barriers in their daily lives, Congress redefined "handicapped individual" as one "who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such impairment, or (C) is regarded as having such an impairment."[123] This new definition placed a greater emphasis on the cultural effects of having a disability, recognizing that people who were previously disabled or appear to be disabled face discrimination. This definition is currently used as the primary definition of disability in federal legislation, including the ADA.

There was a substantial delay by three consecutive administrations before HEW issued the regulations implementing and interpreting the Rehabilitation Act. This delay was due, in part, to the absence of an expressed mandate to issue regulations.[124] The process to develop Section 504 regulations was further delayed by administrative inaction, presidential replacements, and unusual rulemaking procedures.[125] To protest the delay, members of the disability community organized large-scale demonstrations to attract

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[113] H.R. 12154, 92nd Cong. (1971). A companion bill was introduced in the Senate in 1972 by Senator Hubert Humphrey (D-MN), S. 3044, 92nd Cong. (1972).

[114] 29 U.S.C. § 794(a) (1994). The scope of the act extends to all areas in which the government finances or conducts activities and programs, including employment, education, housing, transportation, health services, recreation programs, and others.

[115] NCD, *Equality of Opportunity*, p. 20 (quoting disability historian Richard K. Scotch, *From Goodwill to Civil Rights: Transforming Federal Disability Policy* (Philadelphia: Temple University Press, 1984), p. 156).

[116] 29 U.S.C. § 791(b) (Supp. IV 1998).

[117] 29 U.S.C. § 793(a).

[118] 29 U.S.C. § 792(a) (Supp. IV 1998).

[119] 29 U.S.C. § 792(b)(3) (Supp. IV 1998).

[120] 29 U.S.C. § 792(d) (Supp. IV 1998).

[121] The language of Section 504 did not mention issuing regulations or establishing administrative enforcement mechanisms. Shortly after Section 504 was enacted, the Senate Subcommittee on the Handicapped sent a letter to the Secretary of Health, Education, and Welfare (HEW), Caspar Weinberger, advising him that HEW had the responsibility and authority to secure governmentwide compliance with Section 504. Burgdorf, *Disability Discrimination*, p. 40.

[122] Pub. L. No. 93-516, 88 Stat. 1617 (1974) (codified as amended at 29 U.S.C. § 706(8)(B) (1994).

[123] Pub. L. No. 93-516, § 111(a), 88 Stat. 1617, 1619.

[124] NCD, *Equality of Opportunity*, p. 14.

[125] Ibid.

national attention to the absence of Section 504 regulations.[126]

On April 28, 1977, Section 504 regulations were finally issued.[127] These regulations established legal standards for nondiscrimination uniquely suited to the civil rights needs of persons with disabilities, which would later be replicated in the ADA. The regulations recognized that ending discrimination for persons with disabilities meant taking proactive steps to remove barriers and making reasonable accommodations.[128] Additionally, the regulations balanced this need against a limit of "undue hardship" for the federal agencies and contractors covered by the regulations.[129]

Americans with Disabilities Act

The ADA was enacted in July 1990,[130] 17 years after the passage of the Rehabilitation Act of 1973. In enacting the ADA, Congress acknowledged the history of isolation and segregation of people with disabilities.[131] The act recognizes that the disabled community is subject to discrimination in "employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services."[132] It is hailed as the first comprehensive civil rights legislation for people with disabilities.[133] Nonetheless, some critics believe that the ADA is not as effective as it should be and that "productivity, rather than constitutional rights, is the backbone of American policy regarding people with disabilities."[134]

Legislative History of the ADA

The ADA was borne out of the ideals encompassed in the Civil Rights Act of 1964 and the Rehabilitation Act of 1973[135]—that all people should be treated equally and fairly. "There could be no ADA without them."[136] However, a carte blanche application of legal standards from these civil rights laws to the disability context seemed inappropriate.[137] Applying these prior statutes exposed their weaknesses, which arose from their statutory language, limited coverage, inadequate enforcement mechanisms, and erratic judicial interpretations.[138]

The National Council on Disability[139] was the first organization to draft a federal legislative proposal that attempted to remedy the flaws of previous disability statutes. The NCD was initially established in 1978 as an advisory board within the Department of Education.[140] In 1984, it was transformed into an independent federal agency, led by 15 members appointed by the President of the United States and confirmed by the U.S. Senate.[141] Generally, the NCD is responsible for making recommendations to the President and Congress on issues affecting Americans with disabilities.[142] To meet this objective, the NCD is required to submit an annual report to the President and Congress.[143] While many government agencies deal with issues and programs affecting people with disabilities, the NCD is the only federal agency charged with

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[126] Ibid., pp. 16–19.

[127] 42 Fed. Reg. 22,677 (1977) (to be codified at 45 C.F.R. pt. 84).

[128] 45 C.F.R. § 84.12(b).

[129] 45 C.F.R. § 84.12(c).

[130] Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213 (1994)).

[131] 42 U.S.C. § 12101.

[132] 42 U.S.C. § 12101(a)(3).

[133] President Bush's Signing Statement, book 2, p. 1068 (stating that the signing of the ADA "is the world's first comprehensive declaration of equality for people with disabilities—the first"); Senator Harkin, the primary sponsor of the ADA, called it "the 20th century Emancipation Proclamation for all persons with disabilities." 136 Cong. Rec. S9689 (daily ed. July 13, 1990); Senator McCain proclaimed, "This landmark legislation will mark a new era for the disabled in our Nation." 136 Cong. Rec. S9684.

[134] Drimmer, "Cripples, Overcomers," p. 1400. The congressional findings stated in the text of the ADA recognize that the pervasive discrimination suffered by individuals with disabilities "costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C. § 12101(a)(9).

[135] NCD, *Equality of Opportunity*, p. 20.

[136] Ibid.

[137] Burgdorf, *Disability Discrimination*, p. 44.

[138] Ibid.

[139] The organization was originally named the National Council on the Handicapped, but its name was changed to the National Council on Disability in 1988.

[140] National Council on Disability, "Congressional Mandate," n.d., <http://www.ncd.gov/mandate.html> (July 19, 2000), p. 3.

[141] Ibid., pp. 1–3.

[142] Ibid., pp. 1–2.

[143] Ibid., p. 2.

addressing, analyzing, and making recommendations regarding disability policy.[144]

In its draft proposal of the ADA, the NCD sought to facilitate independence through equal participation while reducing dependence on government and federal outlays.[145] In drafting the ADA proposal, NCD members took care not to recommend funding increases, a strategy that was successful in securing passage of the ADA during a fiscally conservative administration.[146] Although most congressional members supported the concept of a civil rights bill for persons with disabilities, the passage of the ADA was fraught with delay and intense debate over certain provisions. After much strategizing, lobbying, and nationwide consumer forums, as well as the endorsement of President Bush, the ADA was finally enacted.

The Inception of the ADA Concept

Throughout the 1980s, the disability community recorded an impressive string of judicial and legislative victories.[147] One of the crowning achievements was the 1986 National Council on Disability report, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities—With Legislative Recommendations*. The report was the result of a congressional mandate requiring the NCD to produce a comprehensive analysis of federal disability programs and policy by February 1, 1986.[148]

Toward Independence was intended to meet a dual concern: minimizing the federal cost of disability while improving the lives of individuals with disabilities.[149] In meeting its mandate, the NCD presented 45 legislative recommendations in 10 broad topic areas.[150] The first recommendation was that Congress "enact a comprehensive law requiring equal opportunity for individuals with disabilities, with broad coverage and setting clear, consistent, and enforceable standards prohibiting discrimination on the basis of handicap."[151] To make the concept more palatable to reluctant NCD members and ultimately to the Reagan administration, the NCD presented the issue as an "equal opportunity law" rather than "civil rights."[152] The former promoted independence and self-reliance while the latter was more reminiscent of affirmative action.[153] The NCD also suggested a name for the proposed statute—the Americans with Disabilities Act.[154]

The report was widely disseminated and well received by the disability community and President Reagan.[155] More than 20,000 copies of the report were distributed to legislators, government officials, disability advocates, and disability organizations.[156] Although virtually every issue and recommendation presented by the NCD had been initiated or proposed at state and local levels, *Toward Independence* was novel in that it represented a proposal for a *national, comprehensive* approach to disability policy.[157] The proposal came with a thorough explanation for why such an approach was necessary to facilitate the employment and general life satisfaction of persons with disabilities, and what the law should entail.[158]

The *Toward Independence* report specified that the law should prohibit discrimination by the federal government, recipients of financial assistance, federal contractors and subcontractors, private employers, housing providers, places of public accommodation, persons and agencies of interstate commerce, transportation providers, insurance providers, and state and local governments.[159] Unlike previous nondis-

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[144] Ibid.

[145] NCD, *Equality of Opportunity*, pp. 55–56.

[146] Ibid., p. 55.

[147] Ibid., p. 34.

[148] Ibid., p. 51.

[149] Ibid., p. 55.

[150] Burgdorf, *Disability Discrimination*, p. 45. Lex Frieden and Robert Burgdorf were the primary contributors of the report. NCD, *Equality of Opportunity*, p. 55. Mr. Frieden served as the executive director of the NCD, and Mr. Burgdorf was a research specialist with the organization.

[151] National Council on the Handicapped, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities—With Legislative Recommendations*, 1986, p. 18 (hereafter cited as NCD, *Toward Independence*).

[152] NCD, *Equality of Opportunity*, p. 55.

[153] Ibid.

[154] Ibid.

[155] Burgdorf, *Disability Discrimination*, p. 45.

[156] NCD, *Equality of Opportunity*, p. 58. The report was also made available over the Internet.

[157] Ibid.

[158] Ibid., p. 57; NCD, *Toward Independence*, pp. 18–54.

[159] NCD, *Toward Independence*, p. 19.

crimination employment statutes aimed at protecting individuals with disabilities, the draft proposal for the ADA applied to private entities.[160] The legislative proposal also included a reasonable accommodation requirement and affirmative steps to eliminate barriers.[161]

Despite the widespread approval of *Toward Independence*, it remained only a potential solution.[162] The next hurdle would be putting it on the federal legislative agenda. To underscore the desperate need for an equal opportunity law for persons with disabilities, the NCD joined Louis Harris & Associates and the International Center for the Disabled (ICD) in undertaking a national poll to document how a disability affected a person's ability to participate in life and the community.[163] The nationwide survey was based on 1,000 telephone interviews with noninstitutionalized persons with disabilities aged 16 and older. It was the first comprehensive survey of persons with disabilities that solicited their perceptions of their own quality of life.[164] The poll was published in March 1986, a month too late for inclusion in *Toward Independence*.[165] Nonetheless, it provided concrete examples of problems encountered by persons with disabilities, particularly in gaining employment.[166] The correlation between employment and life satisfaction was startling.[167] Ultimately, these findings were a ringing endorsement of initiatives to help individuals with disabilities find work.[168] The survey bolstered the recommendations presented in *Toward Independence* and provided a useful guide for policy development.[169]

Introduction of the ADA to Congress

While some of the NCD's recommendations were acted on in short order, the proposal for an Americans with Disabilities Act did not result in any prompt legislative action.[170] Consequently, in its 1988 follow-up report, the NCD took the unusual step of publishing its own draft bill.[171] Robert Burgdorf, one of the primary contributors to *Toward Independence*, drafted a preliminary legislative proposal similar to the equal opportunity law recommended in *Toward Independence*.[172]

Groups advocating in behalf of individuals with disabilities were instrumental in getting the proposed ADA on the legislative agenda and securing its passage through both houses of Congress. For example, to foster support for the legislative proposal, an informal ADA coalition began to form in Washington, D.C.[173] A number of individuals and variety of organizations formed the coalition.[174] The ADA coalition conducted many of its activities under the auspices of the Consortium for Citizens with Disabilities (CCD).[175] The CCD is a coalition of approximately 100 national disability organizations working together to advocate for national disability policies.[176] Members of the Disability Rights Education and Defense Fund, the Epilepsy Foundation of America, and the National Association of Protection and Advocacy Systems served as coalition leaders.[177] To educate members of Congress about living with a disability, the coalition relied on organizations, such as the Spina Bifida Association, United Cerebral Palsy Association, the National Association of Developmental Disabilities Councils, and the Paralyzed Veterans of America.[178]

During the spring of 1987, Mr. Burgdorf and others began holding brainstorming sessions

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[160] Ibid.

[161] Ibid., pp. 19–20.

[162] NCD, *Equality of Opportunity*, p. 59.

[163] Ibid.

[164] Ibid.

[165] Ibid.

[166] Ibid., p. 60.

[167] Ibid.

[168] Ibid.

[169] Ibid., p. 59.

[170] Burgdorf, *Disability Discrimination*, p. 45.

[171] Ibid.

[172] NCD, *Equality of Opportunity*, app. C, "Chronology: The ADA's Path to Congress," p. 205. After the preliminary draft, Mr. Burgdorf and Lex Frieden worked most intensely on the law. Ibid., p. 62.

[173] Ibid., p. 71.

[174] Ibid.

[175] Ibid. The CCD was originally called the Consortium for Citizens with Developmental Disabilities (CCDD). In 1989, the name was changed to Consortium for Citizens with Disabilities (CCD). Ibid., p. 64.

[176] Consortium for Citizens with Disabilities, "What's New at CCD," n.d., <http://www.c-c-d.org/index.htm> (July 19, 2000), p. 1.

[177] Ibid.

[178] In a report of this kind, it is impossible to mention all the organizations that contributed to the passage of the ADA.

with key persons in the disability community to gain their input and facilitate the drafting of the ADA.[179] Two issues caused discord throughout the disability community in drafting the ADA. The first issue was whether health insurance should be included in the act.[180] In most cases, persons with disabilities could not find affordable health care, and this was particularly true if they did not receive federal disability benefits.[181] To some disability advocates, such as the CCD, health insurance was not a right afforded any other group, and providing this new right to a select group of people may alienate persons in the civil rights community.[182] Passage of the ADA would require the full support of the civil rights community, so it was important to advocate the same protections as those afforded to other federally protected groups.[183] Ultimately, the health care provision was omitted from the ADA draft.[184] The second issue that arose was whether to include the affirmative action provisions of Sections 503 and 504 of the Rehabilitation Act[185] in the ADA. In light of the protracted battle to secure the Section 504 regulations and the subsequent attempt to change the regulations by President Reagan's Task Force on Regulatory Relief, the CCD feared that the inclusion of these provisions in the ADA would mean "an administration unfriendly to disability rights could substantially rewrite and weaken them."[186] Thus, Sections 503 and 504 provisions were excluded from the proposed ADA.[187]

For congressional sponsorship, the NCD approached Senator Lowell Weicker (R-CT), one of the disability community's greatest advocates in the Senate.[188] Senator Weicker had a son with Down syndrome and had played a pivotal role in securing the NCD's reauthorization in 1983.[189] In November 1987, the NCD secured the sponsorship of Senator Weicker.[190] Congressman Tony Coelho (D-CA), an advocate of disability rights and a person with epilepsy, cosponsored the bill in the House.[191] Senator Tom Harkin, chairman of the Subcommittee on the Handicapped, was also solicited for his support because his subcommittee would likely have jurisdiction over the bill in the Senate.[192] As planned, the bill was introduced consecutively in both houses. On April 28, 1988, Senator Weicker introduced the Americans with Disabilities Act,[193] stating that discrimination based on handicap was "just as intolerable as other types of discrimination that our civil rights laws forbid."[194] The following day, on April 29, 1988, Representative Coelho introduced the same measure in the House.[195]

During the congressional hearings of the 100th Congress, the unanimous sentiment among the witnesses was that people with disabilities struggled with unequal opportunities; and they confronted not only the challenges of their impairments, but also the physical barriers society erects.[196] Some of the testimonials described how registered persons with disabilities were turned away from voting booths because they did not look sufficiently "competent to vote," a college student was denied her graduation because college officials deemed her psychologically unfit, and a disability advocate met his untimely death attempting to cross an intersection without curb cuts.[197] In the end, a record of disability discrimination was established, but the 100th Congress expired before either house of Congress took action on the proposed legislation.

The Debate over ADA Provisions

Before its reintroduction in the 101st Congress, the ADA bill was substantially revised.

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[179] Ibid., p. 62.

[180] Ibid., p. 65.

[181] Ibid.

[182] Ibid.

[183] Ibid.

[184] Ibid.

[185] Section 503 provisions mandate that federal contractors affirmatively hire and promote individuals with disabilities. 29 U.S.C. § 793(a). Section 504 provisions prohibit discrimination on the basis of a disability. 29 U.S.C. § 794(a).

[186] NCD, *Equality of Opportunity*, pp. 64–65.

[187] Ibid.

[188] Ibid., p. 63.

[189] Ibid.

[190] Ibid.

[191] Ibid., pp. 63–64.

[192] Ibid.

[193] S. 2345, 100th Cong. (1988).

[194] 134 CONG. REC. 5107, 5109–10 (1988).

[195] H.R. 4498, 100th Cong. (1988).

[196] NCD, *Equality of Opportunity*, p. 87.

[197] Ibid., pp. 89–90.

During the following two years, Congress held numerous hearings on the ADA. The testimony presented at these hearings, as well as comments by House Representatives and Senators, provided persuasive evidence of the need to promote positive change in the lives of people with disabilities.[198] Nonetheless, there were heated debates about certain proposed provisions of the ADA. The two dominant reservations about the act were cost and litigation.[199] The vagueness of the language was cited as a problem by businesses. Because words such as "undue hardship" were inadequately defined, businesses argued that they would not know whether they were in compliance, which would ultimately invite frivolous lawsuits.[200] Cost was an issue because the ADA, unlike other civil rights legislation, required businesses and employers to spend money on accommodations and modifications.[201] Small businesses argued that they should be exempt from the public accommodations requirements, or at least be phased in more gradually, as small businesses were exempt from other civil rights legislation.[202] Numerous covered entities also lobbied to have a more concrete definition of disability that listed every covered disability.[203]

In June and July 1989, Senate leaders and the White House attempted to craft a bipartisan compromise bill.[204] The breakthrough compromise, which facilitated agreement on other issues, was an agreement regarding public accommodations and remedies for violation of the public accommodations provisions.[205] The legislative proposal covered a wider scope of public accommodations than other civil rights legislation.[206] Furthermore, the remedies provided pursuant to the draft bill included compensatory and punitive damages.[207] Senate leaders agreed to restrict the public accommodations remedies to the standards of the Civil Rights Act of 1964 in exchange for the administration's consent to apply the ADA to a broad spectrum of public accommodations.[208] Other agreements followed to ensure passage of the ADA. For example, with respect to employment, negotiators incorporated a two-year delay of the effective date for businesses with 25 or more employees.[209] To allay fears about the inclusion of mental disorders and disorders with a "moral content," the Senate included in the definition of disability a list of specific conditions or impairments that would not be covered under the proposed bill.[210] After winning President Bush's endorsement, the ADA passed the Senate on September 7, 1989, by a count of 76 to 8.[211]

House consideration of the ADA was more difficult and time consuming, in part, because the bill had to go to four committees and six subcommittees.[212] In contrast to the rapid action in the 101st Senate, the House took almost nine additional months to review and refine the bill. House deliberations were fraught with vigorous lobbying efforts by the business community and staunch partisanship.[213] One of the most controversial amendments to reach the floor was introduced by Congressman Jim Chapman (D-TX). This proposed amendment, known as the Chapman amendment, would enable employers to remove persons with contagious diseases, such as AIDS, from food-handling positions.[214] While supporters of the amendment conceded that there was no known evidence that AIDS could be transmitted through food handling, the House initially voted to support the exclusion of persons with contagious and communicable diseases from food-handling positions.[215] Ultimately, the measure was defeated and replaced with a compromise amendment introduced by Senator Orrin Hatch (R-UT). Commonly referred to as the Hatch amendment, this amendment relied more on science as the basis for decisionmak-

[198] Ibid., pp. 107–11, 116.

[199] Ibid., pp. 111, 132.

[200] Ibid., p. 111.

[201] Ibid.

[202] Ibid., p. 132.

[203] Ibid.

[204] Ibid., app. D, "Chronology: Legislative History of the ADA," p. 208.

[205] Ibid., p. 118.

[206] Ibid.

[207] Ibid.

[208] Ibid., p. 119.

[209] Ibid.

[210] Ibid., pp. 121–22.

[211] Ibid., p. 122.

[212] Ibid., p. 127. In the Senate, the bill went only to one committee and one subcommittee. Ibid.

[213] Ibid., p. 129.

[214] H.R. 2273, 101st Cong. § 103(d) (1990).

[215] NCD, *Equality of Opportunity*, pp. 160–61.

ing.[216] The Hatch amendment proposed that the Secretary of Health and Human Services prepare an annual list of communicable and contagious diseases that were transmitted through food handling.[217] Restaurant operators then would be able to insist that anyone with a disease on that list be removed from food-handling positions.[218] On May 22, 1990, both parties in the House passed the bill overwhelmingly with 95 percent of those voting supporting the measure.[219]

PROVISIONS OF THE ADA

The Americans with Disabilities Act . . . signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life.[220]

President Bush signed the Americans with Disabilities Act on July 26, 1990.[221] To meet the goal of a universal ban on discrimination against persons with disabilities, Congress enacted five separate titles[222] to prohibit the discrimination enumerated in the ADA's findings.[223] Through efforts to eliminate discrimination, the act strives to ensure equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.[224]

Title I: Employment

Title I of the act bans discrimination against persons with disabilities in employment.[225] The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees.[226] To strike a balance between the rights of individuals with disabilities and the legitimate interests of businesses, there were various phase-in provisions in the ADA.[227] For example, the employment provisions did not take effect for two years following the effective date of the act, for an employer with 25 or more employees.[228] Four years from the act's effective date, coverage was extended to employers with 15 or more employees.[229]

The ADA defines a disability as (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (2) a record of such impairment, or (3) being regarded as having such an impairment.[230] The person seeking enforcement of the act must be a "qualified individual with a disability," meaning "an individual with a disability who, with or without reasonable accommodation can perform the essential functions of the employment position that such individual holds or desires."[231] A qualified individual with a disability does not include an employee or applicant who is *currently* engaging in the illegal use of drugs.[232]

Pursuant to the act, "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability."[233] This nondiscrimination provision includes making reasonable accommodations. An employer's obligation to provide reasonable accommodation may include:

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[216] Ibid., pp. 172–75.

[217] U.S. Congress, House, Committee on Conference, Joint Explanatory Statement, 101st Cong., 2d Sess., 1990, H. Conf. Rept. 596, at 61–62, *reprinted in* 1990 U.S.C.A.A.N. 565, 570–71.

[218] Ibid.

[219] NCD, *Equality of Opportunity*, p. 164.

[220] President Bush's Signing Statement, book 2, p. 1071.

[221] 42 U.S.C. §§ 12101–12213 (1994).

[222] Titles IV and V will not be discussed in this report because they were not subjects of the ADA hearing held in Washington, D.C., Nov. 12–13, 1998.

[223] Congress found that 43 million Americans had physical or mental disabilities and noted the widespread discrimination faced by people with disabilities throughout history. 42 U.S.C. § 12101(a)(1)–(2). The findings state that individuals with disabilities encounter discrimination "in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." *Id.* § 12101(a)(3). In addition, Congress found that the discrimination took numerous forms, including "outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, programs, activities, benefits, jobs, or other opportunities." 42 U.S.C. § 12101(a)(5).

[224] 42 U.S.C. § 12101(a)(8).

[225] 42 U.S.C. § 12111.

[226] 42 U.S.C. § 12111(5)(A).

[227] President Bush's Signing Statement, book 2, p. 1071.

[228] 42 U.S.C. § 12111(5)(A).

[229] 42 U.S.C. § 12111(5)(A).

[230] 42 U.S.C. § 12102(2)(A)–(C).

[231] 42 U.S.C. § 12111(8).

[232] 42 U.S.C. § 12114(a).

[233] 42 U.S.C. § 12112(a).

(a) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
(b) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications or examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[234]

Employers are not required to make a reasonable accommodation if they can "demonstrate that the accommodation would impose an undue hardship on the operation of the business."[235] In addition, businesses may utilize practices that have a discriminatory effect on persons with disabilities if their actions are "job related" to the position in question and consistent with "business necessity," as long as such practices cannot be accomplished by reasonable accommodation.[236] Another defense available to businesses is "direct threat."[237] An employer does not have to accommodate an individual who poses a "direct threat" to the health and safety of others in the workplace.[238]

Title II: Public Services

The purpose of Title II of the ADA is to extend the protections of Section 504 of the Rehabilitation Act to all programs, activities, and services of state or local governments, regardless of the receipt of federal financial assistance.[239] It prohibits discrimination by state and local governments and requires that they ensure all activities, programs, and public transportation services they provide are accessible to persons with disabilities.[240] The act states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[241] The Department of Justice, which issued implementing regulations for this title in 1991,[242] notes that Title II coverage applies to "Executive agencies" within state and local governments as well as to "activities of the legislative and judicial branches of state and local governments."[243] All government activities of public entities are covered, including those carried out by contractors.[244]

Title II also includes detailed provisions that apply to public transportation systems, including commuter authorities.[245] These provisions resolve some of the controversial and contentious issues regarding accessibility standards for public transportation systems.

This title is particularly important for individuals with psychiatric disabilities. Pursuant to the regulations implementing Title II provisions, "a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[246] In terms of persons with disabilities, this provision mandates that they are not automatically placed in institutions, but in a setting that suits their individualized needs and is conducive to their full participation in community life.

Title III: Public Accommodations and Services Operated by Private Entities

Title III covers public accommodations and services operated by private entities.[247] Its operative provisions provide that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases, or operates a place of public accommodation."[248]

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[234] 42 U.S.C. § 12111(9)(A)–(B).

[235] 42 U.S.C. § 12112(b)(5)(A).

[236] 42 U.S.C. § 12113(a).

[237] 42 U.S.C. § 12113(b).

[238] 42 U.S.C. § 12113(b).

[239] 42 U.S.C. §§ 12131–12165.

[240] 42 U.S.C. §§ 12131–12165. The majority of Title II deals with transportation, which is beyond the testimony given at the Commission hearing. The testimony regarding Title II centered around individuals with psychiatric disabilities and is discussed in detail in chapter 5 of this report.

[241] 42 U.S.C. § 12132.

[242] 28 C.F.R. pt. 35 (1999).

[243] 28 C.F.R. pt. 35, app. A (commentary on § 35.102).

[244] 28 C.F.R. pt. 35, app. A (commentary on § 35.102).

[245] 42 U.S.C. §§ 12141–12161.

[246] 28 C.F.R. § 35.10(d).

[247] 42 U.S.C. § 12181.

[248] 42 U.S.C. § 12182.

Although Title III provisions can be traced to the public accommodations provisions of the Civil Rights Act of 1964, the ADA's concept of public accommodations is broader.[249] The 12 covered entities, which range from a hotel to a park, cover almost every facet of American life in which a business or other entity serves or comes into contact with members of the public.[250]

Title IV: Telecommunications

Title IV provisions pertain to two kinds of telecommunications services: telephone transmissions and television public service announcements.[251] Regarding telephone transmissions, the act amends Title II of the Communications Act of 1934,[252] "to make available to all individuals . . . a rapid, efficient nationwide communication service . . . and to ensure that interstate and intrastate telecommunications relay services are available . . . and in the most efficient manner, to hearing-impaired and speech-impaired individuals."[253] In addition, this title amends Section 711 of the Communications Act to require closed captioning[254] for any television public service announcement that is produced or funded in whole or in part by an agency or instrumentality of the federal government.[255]

Title V: Miscellaneous

Title V contains miscellaneous provisions clarifying the ADA's relationship to other laws.[256] This title broke new ground when it extended coverage to Congress and federal legislative branch agencies.[257] At the time of the ADA's passage, no other law provided for similar coverage.[258] The act not only provided unprecedented coverage of the Senate and House of Representatives, but also provided that the "protections provided pursuant to this Act, the Civil Rights Act of 1964, the Civil Rights Act of 1990, the Age Discrimination in Employment Act of 1967, and the Rehabilitation Act of 1973 shall apply with respect to employment by the United States Senate."[259] In essence, the Senate became subject to four laws upon the ADA's enactment while the House became subject only to the ADA. Title V also contains provisions that prohibit discrimination, coercion, threats, or interference directed at a person who seeks to exercise rights under the act or who testifies or otherwise participates in any investigation or proceeding under the act.[260]

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[249] Burgdorf, *Disability Discrimination*, p. 58.

[250] 42 U.S.C. § 12181(7)(A)–(L).

[251] 47 U.S.C. §§ 225, 611 (1994).

[252] 47 U.S.C. § 225.

[253] 47 U.S.C. § 225(b)(1).

[254] "Closed captioning" refers to a system that allows only viewers with a decoder to view the captions. Burgdorf, *Disability Discrimination*, p. 66. In contrast "open captioning" provides subtitles that appear on the screens of all viewers. Ibid.

[255] 47 U.S.C. § 611 (1994).

[256] 42 U.S.C. §§ 12201–12212 (1994).

[257] Pub. L. No. 101-336, § 509, 104 Stat. 373–75 (1990) (codified at 42 U.S.C. § 12209 (1994)).

[258] Burgdorf, *Disability Discrimination*, p. 117.

[259] 42 U.S.C. § 12209(a)(2).

[260] 42 U.S.C. § 12203.

CHAPTER 2

The Effects of the ADA

One in five Americans has some type of disability and may ultimately be a victim of discrimination.[1] With the goal of eliminating this type of discrimination, Congress enacted the Americans with Disabilities Act of 1990.[2]

The mission of the ADA is to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency to persons with disabilities."[3] While the ADA has spawned litigation and evoked heated discussions, very little systematic research has been done on the impact the ADA has upon those it was intended to help.[4]

In this chapter, the Commission explores the practical effects of the ADA. By understanding and addressing the issues surrounding the actual effects of the ADA, policymakers, legislatures, and private organizations will be better able to embrace the ADA and strive to eliminate discrimination against people with disabilities. To achieve this objective, the Commission addresses the effects of the ADA on people with disabilities, how businesses and employers have implemented and complied with the demands of the ADA, the relation between federal disability benefits programs and the ADA, and the legislative and executive changes it generated.

EFFECTS ON INDIVIDUALS WITH DISABILITIES

Overall Impact of the ADA

One of the areas of improvements were access to buildings, greater inclusion of people with disabilities in the community, increased public sensitivity and awareness, public respect and acceptance.[5]

People with disabilities agree that life has improved since the passage of the ADA.[6] The United Cerebral Palsy Association in a 1996 poll of persons with disabilities, their friends, and family members, found that the ADA had made a great difference in the lives of those who have disabilities.[7] The survey demonstrated that the ADA prompted better access to buildings, greater access to transportation, and fuller inclusion in the community.[8] Employment, how-

[1] According to the U.S. Census Bureau's Current Populations Reports of 1997, approximately 54 million Americans (one in five) have some level of disability and 26 million Americans have a severe disability. U.S. Census Bureau, John M. McNeil, "One in 10 Americans Reported a Severe Disability in 1994–95," <http://blue.gov/Press-Release/cb97-148.html> (May 25, 2000), p. 1 (hereafter cited as McNeil, "One in 10").

[2] 42 U.S.C. §§ 12101–12213 (1994).

[3] 42 U.S.C. § 12101(a)(8).

[4] Peter Blanck, professor of law at the University of the Iowa, states that "systematic information on the work lives of persons with disabilities is lacking." Peter David Blanck, testimony before the U.S. Commission on Civil Rights, hearing, Washington, D.C., Nov. 12–13, 1998, transcript, p. 2 (hereafter cited as Hearing Transcript).

[5] Sally Weiss Testimony, Hearing Transcript, p. 107.

[6] United Cerebral Palsy Association, "1996 ADA Snapshot of America: ADA Changes Lives of People with Disabilities," 1996, p. 3 (hereafter cited as 1996 ADA Snapshot). Ninety-six percent of people polled said the ADA had made a difference in the lives of people with disabilities, and 81 percent of the same people said the ADA had made a difference in their own lives. Ibid. This is the latest of five studies the United Cerebral Palsy Association has published since 1992. The association sent out 10,000 questionnaires to persons identified through the mailing lists of more than 63 organizations of persons with disabilities. Ibid. Although more than 3,000 surveys were returned, the organization had time and resources to analyze only 1,330 of them. Ibid.

[7] Ibid.

[8] Ibid., p. 4. According to the 1996 poll, the ADA was perceived as resulting in better access to buildings by 57 percent of the people polled; improved access to transportation by 46 percent; and better telecommunications access by 25 percent. Ibid.

ever, was an area where people with disabilities experienced less change.[9]

In 1998, the National Organization on Disability/Louis Harris & Associates (Harris Poll) released a U.S. survey of 1,000 individuals finding that only about 33 percent of individuals with disabilities polled stated they were very satisfied with life, as opposed to 60 percent of individuals without disabilities.[10] It also found a large gap between the employment of people with disabilities and people without disabilities.[11]

Employment Opportunities

In passing the ADA, Congress intended to eliminate discrimination in the workplace and create more employment opportunities for individuals with disabilities.[12] According to the most recent U.S. Census Bureau statistics, 25.4 percent of people with a "work disability"[13] between the ages of 16 and 74 years are employed and 22.7 percent are employed full time.[14] Of the people with a "severe work disability,"[15] 7.9 percent are employed and 2.7 percent are employed full time.[16]

According to the 1998 Harris Poll, only 29 percent of individuals with disabilities of working age (18–64 years old) worked full or part time compared with 79 percent of working-age people without disabilities.[17] This survey also reported that 72 percent of the unemployed individuals with disabilities of working age stated they would prefer to work.[18] The Harris Poll found that the proportion of employed working-age adults with disabilities had declined since 1986, when 34 percent of people with disabilities were working.[19]

At the Commission's ADA hearing, Mark Weber, professor of law at DePaul University in Chicago, pointed out that the employment rate for people with disabilities had decreased since 1986.[20] He said, however, that this decline "may or may not be meaningful."[21] In the early 1990s, he noted, the economy was in a recession, which hampered employment opportunities for many people.[22]

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[9] Seventy-five percent of the people polled identified employment/job accommodations as the area in which the least change had occurred. Ibid., p. 6.

[10] National Organization on Disability, "1998 National Organization on Disability/Louis Harris & Associates Survey of Americans with Disabilities," <http://nod.org/presssurvey.html> (Sept. 24, 1998), p. 1 (hereafter cited as 1998 Harris Poll).

[11] Ibid.

[12] 42 U.S.C. § 12111.

[13] The U.S. Census Bureau defines a disability as a difficulty in performing functional activities (seeing, hearing, talking, walking, climbing stairs, and lifting and carrying a bag of groceries) or activities of daily living (getting in or out of bed or chair, bathing, getting around inside the home, dressing, using the toilet, and eating) or other activities relating to everyday tasks or socially defined roles. A severe disability is defined as an inability to perform one of these activities or tasks or needing personal assistance. McNeil, "One in 10."

[14] U.S. Census Bureau, March 1999 Current Population Survey, "March 1999 Current Populations," <http://blue.ensu.gov/hhes/www/disable/cps/cps299.html> (June 7, 2000), p. 1.

[15] The U.S. Census Bureau defines a disability as a difficulty in performing functional activities (seeing, hearing, talking, walking, climbing stairs, and lifting and carrying a bag of groceries) or activities of daily living (getting in or out of bed or chair, bathing, getting around inside the home, dressing, using the toilet, and eating) or other activities relating to everyday tasks or socially defined roles. A severe disability is defined as an inability to perform one of these activities or tasks or needing personal assistance. McNeil, "One in 10."

[16] Ibid.

[17] 1998 Harris Poll, p. 1. This survey did not make any distinctions between individuals with severe and nonsevere disabilities; therefore, it is difficult to make a comparison between employment rates cited by the Harris Poll and the U.S. Census Bureau.

[18] Ibid.

[19] Ibid. A study of labor force participation among persons with disabilities from 1983 to 1994 using the National Health Interview Survey showed that labor force participation rates for persons with disabilities increased in the 1980s but did not change significantly from 1990 to 1994. Laura Trupin, Douglas S. Sebasta, Edward Yelin, Mitchell P. LaPlante, "Trends in Labor Force Participation Among Persons with Disabilities, 1983–1994," *Disability Statistics Report*, no. 10 (Washington, D.C.: U.S. Department of Education, National Institute on Disability and Rehabilitation Research). However, according to the U.S. Census Bureau's Survey of Income and Program Participation Data, there was an increase in employment among persons with severe disabilities between 1991–92 and 1994–95. John M. McNeil, "Americans with Disabilities: 1994–95," U.S. Census Bureau, Current Population Reports, P70-61 (August 1997), p. 3. The Current Population Survey shows that there was no change in employment rates of persons with disabilities between 1990 and 1998.

[20] Mark Weber Testimony, Hearing Transcript, p. 166. *See also* Mark C. Weber, "Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities," *Buffalo Law Review*, vol. 46 (1998), p. 128 (hereafter cited as Weber, "Beyond the ADA").

[21] Weber, "Beyond the ADA," p. 128, n. 18.

[22] Ibid.

Addressing the effects of the ADA on the employment of people with disabilities, John Bound, professor of economics at the University of Michigan, testified that while it is natural to look at aggregate statistics to determine the effects of the ADA on the employment rate, it is a dangerous exercise given that there are many other reasons contributing to the employment rate.[23] Dr. Bound believes that even though the decline in the employment rate of individuals with disabilities was contemporaneous with the enactment of the ADA, there were a variety of other plausible reasons for that decline, and therefore, it would be unwise to jump to the conclusion that these aggregate statistics reflect the effects of the ADA.[24] Dr. Bound opined that the decline in the employment rate could be correlated to the growth of disability benefits programs in the 1990s.[25] He based this opinion on the fact that historical survey data indicated that when Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI) expanded during the 1970s, the employment rate of people with disabilities dropped and it tended to stabilize when these programs were not being expanded.[26] The employment rate declined again when SSI and SSDI started to expand in the 1990s.[27] In other words, when greater benefits were provided, the aggregate statistics showed more people left the work force and joined the SSI/SSDI rolls.

Sally Weiss, special projects coordinator of the United Cerebral Palsy Association, testified at the Commission's ADA hearing about the association's efforts of job placement for people with disabilities.[28] She stated the United Cerebral Palsy Association has been very successful in placing people with multiple and severe disabilities in jobs in approximately 40 cities nationwide, where the jobs were restructured or other types of accommodations were made.[29] Ms. Weiss stated many of the jobs were found in small businesses and half of the people placed were people of color.[30] She explained that by conducting a vocational profile on a person to determine the person's strengths, and incorporating what he or she likes and dislikes doing, the United Cerebral Palsy Association placed many people with severe disabilities in jobs.[31] The association found that it works better when jobs are restructured based on ability rather than placing individuals with disabilities into existing conventional jobs.[32]

A study of Manpower, Inc., provides additional proof of successful job placement of individuals with disabilities. Peter David Blanck, professor of law at the University of Iowa School of Law, conducted a case study of Manpower, Inc., one of the largest temporary employment services companies in the United States.[33] Testifying on behalf of Dr. Blanck, Michael Morris, said Manpower had been very successful in placing people with disabilities.[34] The study examined the employment opportunities available to individuals with physical and mental disabilities.[35] It explored "the importance of hiring and job-training opportunities as strategies that provide a bridge to full-time employment for qualified persons with disabilities."[36] The findings of the study showed that Manpower "effectively and promptly" placed unemployed people with disabilities.[37] The study revealed that 90 percent of the individuals studied were employed within

[23] John Bound Testimony, Hearing Transcript, p. 102.

[24] Ibid., p. 118.

[25] Ibid.

[26] Ibid.

[27] Ibid.

[28] Weiss Testimony, Hearing Transcript, p. 133.

[29] Ibid.

[30] Ibid.

[31] Ibid.

[32] Ibid., p. 136. There is no indication that those who were accommodated in this study would have been considered "qualified individuals with disabilities" for ADA purposes.

[33] Peter David Blanck, Statement, Hearing before the U.S. Commission on Civil Rights, Washington, D.C., Nov. 12–13, 1998, Exhibit 6, p. 4 (hereafter cited as Blanck Statement). This study also did not reveal whether the individuals studied were "qualified individuals with disabilities" under the ADA. Neither this study nor testimony before the Commission's ADA hearing regarding this study indicated whether the ADA was a cause for job placement.

[34] Michael Morris testified on behalf of Peter Blanck. Both Dr. Blank and Mr. Morris represent a part of a new center that has been funded by the U.S. Department of Education, National Institute on Disability and Rehabilitation Research. Michael Morris Testimony, Hearing Transcript, p. 112.

[35] Blanck Statement, p. 4.

[36] Ibid., p. 5.

[37] Ibid.

10 days of applying to Manpower.[38] Sixty percent of the individuals with disabilities moved from temporary positions to full-time employment.[39] Ninety percent of the people studied were placed in a job or industry consistent with their skills and interests.[40] Dr. Blank stressed that "these findings suggest important implications for policymakers, employers, health professionals, and others in expanding employment opportunities for qualified individuals with disabilities in ways that are consistent with the goals of the ADA."[41]

While the ADA has no doubt increased employment opportunities for people with disabilities and changed the public's perception of them, some believe more must be done. Mr. Weber believes discrimination persists against people with disabilities and that it is demonstrated by both statistical and anecdotal information.[42] He testified at the Commission's ADA hearing:

> It isn't in any way a condemnation of the act. I think the act has been highly effective in voluntary compliance, and there have been interesting and good court successes. The fact is, however, that employment decisions take place behind closed doors. If there is subtle or if there's unconscious discrimination or stereotyping going on, a person doesn't know about that, and the act isn't very good at being able to ferret that out.[43]

Mr. Weber went on to explain that people with disabilities are less competitive due to their disabilities, which limit activities they can do and put them at an economic disadvantage.[44] He also believes that the ADA's protection for individuals with disabilities is minimally effective and that it tends to favor people at the margins of the ability spectrum—those who can be made more competitive with reasonable accommodation or who are only perceived to be disabled.[45] The ADA, he said, "leaves a lot of people out in the cold."[46] He believes that laws protecting individuals with disabilities need to be enforced, strengthened, expanded in scope, and supplemented with a system of job set-asides for people with severe disabilities.[47]

Public Accommodations and Public Services

Years ago, my adult son, who must be fed and who is in a chair, and I were excluded from movies and asked to leave restaurants. Now people accept our presence in all environments.[48]

Most people with disabilities agree that access to public accommodations and public services has improved for people with disabilities since the ADA.[49] Seventy-six percent of those polled by the United Cerebral Palsy Association stated the ADA had brought the greatest change in access to public accommodations.[50] Eighty-eight percent of the respondents said local businesses were more accessible, and 80 percent thought government buildings and other public facilities (parks, recreation centers, and libraries) were more accessible.[51] The Harris Poll confirmed the United Cerebral Palsy Association's results, finding that 63 percent of people with disabilities felt that their access to public facilities had improved over the past 10 years.[52]

Transportation

Public transportation should be accessible to all of the public. We all benefit from accommodations for some.[53]

Certainly, making public transportation accessible to all is a goal of the ADA.[54] Both Titles

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[38] Ibid.

[39] Ibid.

[40] Ibid.

[41] Ibid.

[42] Weber Testimony, Hearing Transcript, p. 164.

[43] Ibid., p. 165.

[44] Ibid.

[45] Ibid.

[46] Ibid.

[47] Ibid.

[48] 1996 ADA Snapshot, p. 4.

[49] Public services is covered under Title II and public accommodations is covered under Title III. There was very limited statistical data on accessibility to public accommodations and public services. This limited statistical data failed to clarify whether the data relates to public services provided by public entities or public accommodation provided by private entities. The majority of the Commission's ADA hearing testimony was in regard to the effects of the ADA on employment, therefore this report has focused on the data provided by the witnesses.

[50] 1996 ADA Snapshot, p. 15.

[51] Ibid.

[52] 1998 Harris Poll.

[53] United Cerebral Palsy Association, *Project Access for All*, 1998, p. 10.

II and III of the ADA include provisions on transportation.[55] The transportation provision in Title II is applicable to public transportation provided by public entities, and Title III is applicable to public transportation provided by private entities.[56] Under these provisions, both public and private entities providing public transportation are mandated to make transportation "readily accessible and usable" to individuals with disabilities.[57]

According to the United Cerebral Palsy Association's 1996 survey, 45 percent of respondents said more people with disabilities were using public transportation.[58] The survey reported that 34 percent of the people surveyed believed that access to transportation had improved since the ADA.[59] The survey found, however, that 32 percent of the individuals polled felt that access to transportation was an area where they noticed the least change.[60] Ms. Weiss reiterated at the Commission's ADA hearing that along with employment accommodations, transportation is the area of least change.[61] This transportation problem was also found by the Harris Poll. Thirty percent of the individuals with disabilities responding to the Harris Poll believed that inadequate transportation was a problem, while only 17 percent of individuals without disabilities considered transportation a problem.[62] The Harris Poll also found that 60 percent of the people polled reported that access to public transportation had improved since 1994.[63]

Effects on Employers and Businesses

EEOC's Enforcement of the ADA

The employment provisions of the ADA became effective and binding on businesses with over 25 employees in 1992 and for businesses with 15 or more employees by 1994.[64] When the ADA was enacted, the Equal Employment Opportunity Commission (EEOC) was given enforcement authority for the employment provisions under Title I.[65] According to Christopher Kuczynski, director of the ADA Policy Division for the EEOC, between 1992 and 1998, the EEOC received more than 91,000 charges alleging discrimination based on disability.[66] The EEOC successfully resolved over 11,000 of these ADA charges, resulting in more than $225 million in monetary relief for individuals with disabilities.[67] Mr. Kuczynski testified that of the approximately 300 cases that were litigated, the EEOC was successful in 95 percent of the approximately 200 cases that have been resolved as of June 30, 1998.[68] He added that "when [EEOC] decides to bring litigation under the ADA, the EEOC is overwhelmingly successful."[69] In addition, he pointed out that as a result of many of the discrimination cases, employers have changed their policies, resulting in increased access for people with disabilities.[70]

There are some criticisms that EEOC's enforcement of the ADA has fallen short of the statute's intent to increase hiring of individuals with disabilities.[71] As Mr. Kuczynski acknowledged at the Commission's ADA hearing, more than 52 percent of discrimination charges the EEOC received under the ADA were termination charges and hiring charges comprised only 10 percent.[72] Thus, the fact that there are more termination charges than hiring charges has led some critics to argue that the EEOC's enforcement of the ADA is inadequate. However, Mr. Kuczynski does not believe that these statistics on hiring charges and termination charges demonstrate that the ADA's intended purpose is not being enforced.[73] He argued, "There's a number

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[54] *See* 42 U.S.C. §§ 12141–12165, 12186(a).

[55] 42 U.S.C. §§ 12141–12165, 12186(a).

[56] 42 U.S.C. §§ 12141–12165, 12186(a).

[57] 42 U.S.C. §§ 12142(a), 12182(b)(2)(B)(I).

[58] 1996 ADA Snapshot, p. 6.

[59] Ibid.

[60] Ibid.

[61] Weiss Testimony, Hearing Transcript, p. 107.

[62] 1998 Harris Poll.

[63] Ibid., p. 11.

[64] 42 U.S.C. § 1212(5)(A).

[65] 42 U.S.C. § 12181.

[66] Christopher J. Kuczynski, Statement, Hearing before the U.S. Commission on Civil Rights, Washington, D.C., Nov. 12–13, 1998, Exhibit 5A (hereafter cited as Kuczynski Statement).

[67] Christopher Kuczynski Testimony, Hearing Transcript, p. 108.

[68] Ibid.

[69] Kuczynski Statement, p. 1.

[70] Ibid.

[71] John Hood, "Taking the Byte Out of Disability," *Policy Review*, March/April 1996, pp. 6–7.

[72] Kuczynski Testimony, Hearing Transcript, p. 138.

[73] Ibid.

of reasons under all the statutes why hiring claims are often difficult to bring and to prove, and it's not surprising that the numbers might be lower."[74] Mr. Kuczynski explained that to the extent the percentage of charges alleging unlawful termination is somewhat higher under the ADA than under the other laws the EEOC enforces, that difference may be attributed in part to individuals who develop disabilities while working.[75] He believes people with disabilities or people who develop a disability on the job want to continue to work rather than receive disability benefits.[76] Mr. Kuczynski opined, "I think that an intended purpose of the ADA is to keep people working rather than receiving benefits. It doesn't necessarily mean . . . that the cases are less in the spirit of what the ADA intended simply because they involve discharge."[77]

Costs to Businesses for Complying with the ADA

The Administration and the Congress have carefully crafted the ADA to give the business community the flexibility to meet the requirement of the Act without incurring undue costs.[78]

Under Title I of the ADA, all covered employers are mandated to provide reasonable accommodation for employees with disabilities to the extent that it does not cause undue hardship.[79] Critics of the ADA argue the ADA has placed a financial burden on businesses by forcing them to comply with its mandate.[80] According to Ann Reesman, general counsel of the Equal Employment Advisory Council (EEAC),[81] some employers are doing everything they can to try to comply with the ADA.[82] Some employers, she said, have gone as far as establishing special positions, such as reasonable accommodation coordinator or ADA coordinator, or establishing reasonable accommodation committees.[83] She stated many of these employers make accommodations because of the ADA.[84] In her opinion, "[t]he ADA has promoted some great strides, both in fueling technology and empowering people who didn't otherwise feel that they could come forward and compete for a job, that they are able to do that now."[85]

Ms. Reesman also said many of EEAC's 300 member employers are firmly committed to nondiscrimination and equal employment opportunity—the principles underlying the ADA.[86] Many of these companies are federal government contractors who have been subject to Section 503 of the Rehabilitation Act.[87] Therefore, these companies already had considerable experience in providing equal employment opportunities for individuals with disabilities when the ADA was passed.[88] Ms. Reesman stated:

> The ADA has heightened awareness among companies that were not already familiar with the tandem concepts of nondiscrimination and reasonable accommodation and among individuals with disabilities who might not otherwise have had the confidence to try to compete for a job with a large company. So we believe that the ADA had opened up opportunities in that way.[89]

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[74] Ibid.

[75] Ibid., pp. 138–39. Mr. Kuczynski indicated in his testimony that the percentage of ADA charges alleging hiring discrimination is actually higher than the percentage of charges alleging failure to hire under the other statutes that the EEOC enforces, and that the percentage of charges alleging unlawful termination is only slightly higher than the percentage of termination charges under Title VII and the Age Discrimination in Employment Act. Ibid.

[76] Ibid., p. 139.

[77] Ibid.

[78] President George Bush's Statement on Signing the Americans with Disabilities Act of 1990, *Public Papers of the Presidents of the United States, George Bush* (1990), book 2, p. 1071, *reprinted in* 1990 U.S.C.A.A.N. pp. 601–02.

[79] 42 U.S.C. § 12112(b)(5)(A).

[80] *See generally* David Harger, "Drawing the Line Between Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act: Reducing the Effects of Ambiguity on Small Businesses," *Kansas Law Review*, vol. 41 (1993), p. 783 (hereafter cited as Harger, "Drawing the Line").

[81] EEAC is a nonprofit organization established in 1976 to promote sound approaches to eliminating employment discrimination, and it has over 300 of the nation's largest private employers as members. Ann E. Reesman Testimony, Hearing Transcript, p. 161.

[82] Ibid., p. 180.

[83] Ibid.

[84] Ibid. p. 181.

[85] Ibid.

[86] Ibid., p. 161.

[87] Ibid., p. 162; 29 U.S.C. § 701 (1994 & Supp. IV 1998).

[88] Reesman Testimony, Hearing Transcript, p. 162.

[89] Ibid., p. 163.

Ms. Reesman, however, maintained that while many of EEAC's member employers have been committed to complying with the ADA, accommodations are not without costs to employers.[90] She acknowledged that some of the typical accommodations are inexpensive.[91] However, she stated that although some accommodations do not require physical adaptation, this does not mean that they are free.[92] She explained that some of the accommodations are difficult to quantify, such as a change of work schedule, job restructuring, restructuring a work team, and providing extra supervision.[93] Ms. Reesman testified that an average large corporation has no problem making reasonable accommodations and is willing to absorb some of those expenditures as a part of doing business.[94]

Many proponents of the ADA maintain that most job accommodations are inexpensive. Dr. Blanck believes that it is more expensive to terminate a person with a disability than to accommodate him or her.[95] According to John Lancaster, executive director of the President's Committee on Employment of People with Disabilities, the average cost of an accommodation in the 15 years of running the Committee's Job Accommodation Network (JAN) has been $200.[96]

Dr. Blanck's study of Sears, one of the largest corporations in America with about 300,000 employees, revealed that more than 75 percent of accommodations for people with disabilities required no cost.[97] During this study period of 1978 to 1998, the average direct cost for accommodations was less than $30.[98] Michael Morris explained that Dr. Blanck's study of Sears showed there were many positive "unintended economic consequences of accommodations."[99] The study found that some accommodations were applied universally to employees with and without disabilities, which increased overall productivity and improved morale.[100] Mr. Morris believes that this positive outcome "has often gotten . . . lost or has not . . . come forward as people have pretty much been swayed with the anecdotal story of a particular accommodation that was so large in terms of cost."[101] Mark Weber testified:

> The vast majority of accommodations are extraordinarily cheap . . . and . . . there are significant economic benefits, not only putting people back to work who would otherwise be on workers' compensation or on other benefits programs, but also simply better ways of doing the job that have been developed because of reasonable accommodation.[102]

Mr. Weber added that employers who are going beyond the legal requirements of the ADA are finding that it is not as expensive as they thought and that there are unexpected economic benefits.[103]

Litigation Costs and the ADA

At the time the ADA was passed, some critics argued that the ambiguity and vagueness of its terms would cause overwhelming compliance and litigation costs, and that this would be especially harmful to small businesses.[104] They believed that the costs of defending a lawsuit could force small businesses into bankruptcy.[105] The proponents of the ADA, however, argued that under the Rehabilitation Act, the predecessor to the ADA, only 265 lawsuits were filed between 1973 and 1990.[106] This means that in the 17 years preceding the ADA's enactment, there

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[90] Ibid., p. 176.

[91] Ibid.

[92] Ibid.

[93] Ibid.

[94] Ibid.

[95] Morris Testimony, Hearing Transcript, p. 143.

[96] Lancaster Testimony, Hearing Transcript, p. 157. This is a review over a 15-year period. A Web site provided by JAN states that 80 percent of job accommodations JAN suggests cost less than $500. Job Accommodation Network, "Discover the Facts about Job Accommodations," <http://www.jan.wvu.edu/English/accfacts.htm> (June 2, 2000), p. 1.

[97] Morris Testimony, Hearing Transcript, p. 114. Peter Blanck and Michael Morris both represent part of a new center that has been funded by the U.S. Department of Education, National Institute on Disability and Rehabilitation Research. This study of Sears, one of the largest corporations in America with approximately 300,000 employees, examined more than 600 workplace accommodations covering the period of 1978 to 1998. Ibid.

[98] Ibid.

[99] Morris Testimony, Hearing Transcript, p. 143.

[100] Ibid.

[101] Ibid.

[102] Mark Weber Testimony, Hearing Transcript, p. 172.

[103] Ibid., p. 173.

[104] Harger, "Drawing the Line," pp. 789–90.

[105] Ibid., p. 791.

[106] Ibid.

were relatively few cases litigating similar provisions under the Rehabilitation Act. Therefore, these concerns for increased litigation under the ADA were unfounded.[107]

However, some panelists at the Commission's ADA hearing contended the ADA has spawned costly litigation. Christopher Bell, a managing partner of the Minneapolis office of Jackson, Lewis, Schnitzler & Krupman, explained that "the experience of many employers, unfortunately, is as the recipient of a charge of discrimination or, worse yet, of an ADA lawsuit . . . The ADA is a statute over which everything is litigated."[108] Mr. Bell, testifying on behalf of the Society for Human Resource Management, said the organization is very supportive of the ADA and of employing people with disabilities.[109] He expressed concern, however, about substantial litigation costs to employers resulting from the act, noting that while employers win over 92 percent of the ADA cases it can cost an employer more than $150,000 to do so.[110]

In Mr. Bell's view, the ADA should be refined.[111] He suggested Congress review the ADA, in light of the law that has been developed, to "define some of these parameters to better effectuate the purpose."[112] Mr. Bell expressed that the volume and nature of litigation under the ADA is different from other federal equal employment statutes.[113] Before the ADA, he said, federal employment policy mandated that employers could not make distinctions based on a protected characteristic and that they were required to treat everyone the same.[114] The ADA, however, requires employers to hire people based on ability and not based on disability, to treat similarly situated people alike, and to treat some "qualified" individuals with disabilities differently if necessary to provide equal employment opportunity.[115] In his opinion, the ADA requires differential treatment, creating more litigation and making it more difficult to litigate than other employment laws.[116]

Ms. Reesman agreed that litigation under the ADA is costly to employers.[117] She said courts dismiss many ADA employment cases because they do not meet the threshold requirements.[118] Further, because the ADA mandates reasonable accommodations to the extent that there is no undue hardship or direct threat to the employer, many cases are dismissed when the plaintiff falls within the definition of an individual with a disability but the accommodation that he or she needs is beyond the ADA's requirements.[119] It is for these reasons that many ADA lawsuits ultimately end in favor of employers.[120] Regardless of the outcome, employers bear the costs of defending these lawsuits.[121] It could cost an employer $50,000 to $100,000 in attorneys' fees to have the court dismiss a claim, Ms. Reesman noted.[122]

In response to arguments that there is too much litigation under the ADA, John Lancaster, executive director of the President's Committee on Employment of People with Disabilities, argued that the ADA requires lawyers, courts, and employers to treat each person individually and each case on a case-by-case basis.[123] He explained that people with disabilities are a very diverse group, but they are discriminated against because of stereotypes and misconceptions about them as a group.[124] "If you don't have a case-by-case basis, you have a real problem, and possibly, reinforce stereotypes and misconceptions. I think the beauty of the law is it forces a case-by-case, individual approach," he said.[125] While Mr. Lancaster acknowledged that there are some burdens to employers in terms of litigation, he believes that "things will shake out" over time.[126] He further commented that the courts

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[107] Ibid.

[108] Christopher Bell Testimony, Hearing Transcript, p. 159.

[109] Ibid., p. 158.

[110] Ibid.

[111] Ibid.

[112] Ibid.

[113] Ibid., p. 183.

[114] Ibid.

[115] Ibid.

[116] Ibid.

[117] Reesman Testimony, Hearing Transcript, p. 179.

[118] Ibid., p. 178. *See* discussion in chapter 3 of this report.

[119] Ibid.

[120] Ibid.

[121] Ibid.

[122] Ibid.

[123] Lancaster Testimony, Hearing Transcript, p. 184.

[124] Ibid.

[125] Ibid.

[126] Ibid.

and people are doing a good job in making it work.[127]

Effects of Federal Disability Benefits Programs

Public policy most often creates a path to premature retirement for people with disabilities, not one to rehabilitation and work.[128]

A disability policy that expects people with disabilities to work cannot stop with the ADA as the primary mechanism for ensuring this outcome. Other areas of disability policy need to be reformed to effect the ADA's mandate of integrating people with disabilities into mainstream life. The interplay between the ADA and federal disability benefits programs—administered under Titles II and XVI of the Social Security Act—greatly affects the employment of individuals with disabilities. This interplay has prompted executive and legislative action to create more employment opportunities for individuals with disabilities.

One of the biggest hurdles for persons with disabilities who want to work is inadequate access to health care.[129] Oftentimes, if an individual with a disability who is receiving federal disability benefits becomes employed, these critical health care benefits are forfeited.[130] Further, private health insurance often precludes coverage for pre-existing conditions and offers minimal coverage for mental health needs and long-term supports and services.[131] The same predicament occurs for an individual with a disability who is not receiving federal disability benefits but becomes functionally disabled while working. Assuming the employer provides an accommodation and the individual is able to work, disability benefits may not be available because of his or her work status and level of income.[132] Individuals with disabilities are, therefore, faced with working and having to pay their own disability-related expenses, or receiving federal disability benefits and not working. In essence, it does not pay to work.

While people with disabilities want to work, the overriding message sent to them is that they are not expected to work.[133] Over 95 percent of federal funds spent on individuals with disabilities are targeted for supporting dependency.[134] Markedly less money and time are spent on supporting people with disabilities in pursuing and maintaining employment.[135] For most people with disabilities, the barriers to working remain significant and working is too often an irrational choice.[136] The Social Security disability programs rarely assess an individual's functional capacity and productivity with appropriate accommodations.[137] Rather, these programs focus on disability rather than ability, leaving many employment opportunities unrealized.[138]

One panelist at the Commission's ADA hearing suggested that the ADA has made it harder for individuals with disabilities to be employed.[139] Disability advocates believe that "the real issues here do not lie within the ADA. They lie in much more profound issues related to how the government is dealing with this problem in other arenas."[140] These other arenas include (1) economic incentives for individuals with disabilities and employers, (2) education, (3) access to transportation and personal assistance services, and (4) technologies and telecommunications.[141] The number one issue to address with respect to

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[127] Ibid., p. 185.

[128] National Council on Disability, *Achieving Independence: The Challenge for the 21st Century*, Employment, 1996, p. 1 (hereafter cited as NCD, *Achieving Independence*).

[129] *See* Marca Bristo Testimony, Hearing Transcript, p. 69. *See also* National Task Force on Employment of Adults with Disabilities, *Recharting the Course: First Report of the Presidential Task Force on Employment of Adults with Disabilities*, Executive Summary (hereafter cited as Task Force, *Recharting the Course*).

[130] Task Force, *Recharting the Course*, Executive Summary.

[131] NCD, *Achieving Independence*, p. 2.

[132] *See* 42 U.S.C. §§ 423(d), 1382c(a)(3)(A)–(B) (1994 & Supp. IV 1998).

[133] NCD, *Achieving Independence*, p. 2.

[134] Ibid.

[135] Ibid.

[136] Ibid.

[137] Ibid., p. 3.

[138] Ibid.

[139] Walter Olson Testimony, Hearing Transcript, p. 48. Mr. Olson is an author of several books, including *The Excuse Factory*, which devotes several chapters to the Americans with Disabilities Act.

[140] John Lancaster Testimony, Hearing Transcript, p. 185.

[141] Ibid., pp. 185–86.

employing individuals with disabilities is health care.[142]

Cash Benefits from Federal Programs and Their Impact

The federal government provides disability benefits under two programs administered by the Social Security Administration (SSA). Both Social Security Disability Insurance (SSDI) and Social Security Income (SSI) are designed to provide minimal financial support for people who, because of a disability, are generally incapable of gainful employment.[143] Pursuant to both statutes, a person is "disabled" if he or she cannot engage in "substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or can be expected to last for a continuous period of not less than one year."[144] To meet this definition, an applicant must have a "physical or mental impairment . . . of such a severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy."[145]

Social Security Disability Insurance (SSDI)

The collection of programs, known generically as SSDI, comprises several types of disability benefits. The Social Security Act authorizes disability insurance benefit payments to disabled or blind individuals who have worked and paid Federal Insurance Contributions Act (FICA) Social Security tax for a sufficient period to obtain "insured" status. It also provides disability benefits for adult disabled children of insured workers who have died, retired, or are receiving disability benefits, and for disabled widows and widowers of insured workers.[146] Although there are variations among the programs, they all require that the individual be (1) medically disabled; and (2) not working, or working but earning less than the substantial gainful activity (SGA) level at the time disability entitlement can begin.[147] As of July 1, 1999, the SGA amount for persons with disabilities was increased from $500 to $700 per month.[148] This new amount means that if an applicant for disability benefits has an average monthly income that exceeds $700, he or she is not considered "disabled" and is unable to collect Social Security disability benefits.

For SSDI, SGA is not only used as a factor for determining disability, but it also determines the length of entitlement.[149] The SSA reviews disability cases periodically to determine whether a beneficiary's condition has medically improved and, if so, whether he or she can perform SGA.[150] Entitlement ceases when the SSA finds that the beneficiary's impairment has improved and is no longer disabling. It may also cease after a time if the individual returns to work at the SGA level. The SSA, however, provides a number of "incentives" for returning to work during which the individual may retain entitlement, as described later in this report.[151]

Generally, a potential beneficiary must wait five full calendar months before SSDI benefits begin.[152] Everyone eligible for SSDI benefits is also eligible for Medicare after receiving benefits for two years.[153] Once an applicant becomes eligible, payments are calculated based on the worker's lifetime average earnings covered by Social Security.[154] The payment amount is adjusted each year to compensate for cost-of-living

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[142] Ibid., p. 185.

[143] Maureen Weston, "The Road Best Traveled: Removing Judicial Roadblocks That Prevent Workers From Obtaining Both Disability Benefits And ADA Civil Rights Protection," *Hofstra Law Review*, vol. 26, no. 2 (1997), p. 392 (hereafter cited as Weston, "Road Best Traveled").

[144] Ibid. (citing 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A) (Supp. IV 1998)).

[145] Ibid. (citing 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B)).

[146] 42 U.S.C. § 402(d)–(f).

[147] Social Security Administration, "Disability," no. 05-10029, ICN 456000 (September 1999). While work activity is only one of the tests used to decide the existence of a disability, it is a critical threshold in disability evaluation. Ibid.

[148] 20 C.F.R. § 404.1574 (1999). *See also* "Substantial Gainful Activity Amounts," 64 FR 18566 (Apr. 15, 1999).

[149] Social Security Administration, Office of Employment Support Programs, *Redbook on Work Incentives: A Summary Guide to Social Security and Supplemental Security Income Work Incentives for People with Disabilities*, 1999, p. 11 (hereafter cited as SSA, *Redbook on Work Incentives*).

[150] Ibid., pp. 16–17.

[151] Ibid., p. 17.

[152] Ibid.

[153] Ibid. Medicare provides insurance coverage for hospital and physician services for individuals with disabilities or retirees if they have a sufficient work history. *See* 42 U.S.C. §§ 1395–1395ccc (1994 & Supp. IV 1998).

[154] SSA, *Redbook on Work Incentives*, p. 17.

increases.[155] In some instances, the amount may be reduced by workers' compensation payments and/or public disability benefits.[156] Unlike SSI, however, the worker's income or resources do not affect the benefit amount.[157] As of September 1995, the average SSDI payment was $756 per month.[158]

Supplemental Security Income (SSI)

Title XVI of the Social Security Act, Supplemental Social Security, was enacted in 1972 and went into effect in 1974. The SSI program replaced state-run welfare programs and provides cash benefits to individuals with disabilities who have limited means.[159] To be eligible for SSI, individuals must be at least 65 years old, blind, or disabled.[160] Although the eligibility requirements are similar for both SSI and SSDI, some applicants are not eligible for SSDI because they have not worked and contributed to the Social Security Trust Fund for a sufficient period of time. SGA is also used as a factor to determine eligibility for SSI benefits, but unlike SSDI, it is not used in determining the continuation of benefits.[161] Social Security Income eligibility continues until a beneficiary improves medically or is terminated for a nondisability-related reason.[162] In addition, benefits are immediately available to eligible applicants, i.e., there is no waiting period.[163] In 32 states and the District of Columbia, an SSI application is considered a Medicaid application, making the applicant immediately eligible for Medicaid benefits.[164]

Social Security Income payment amounts are based on the amount of other income received, living arrangement, and the state in which the applicant resides.[165] The basic monthly payment, known as the Federal Benefit Rate (FBR), is adjusted each year to account for cost-of-living increases.[166] The FBRs for 2000 are $512 per month for an eligible individual and $769 per month for an eligible couple.[167]

At the Commission's ADA hearing, Kenneth D. Nibali, associate commissioner for disability at the Social Security Administration, commented that "once you're on the [Social Security disability] rolls, the vast majority of people stay there for quite some time."[168] In fact, most people with disabilities who become Social Security beneficiaries remain on the rolls for their entire lives.[169] This dependency on Social Security benefits programs can, in turn, have a detrimental effect on the employment rate of individuals with disabilities.[170] This effect illustrates this country's longstanding reliance on public assistance to aid individuals with disabilities rather than on programs that will increase their independence and integration into the work force.

Growth Trends of Cash Benefits

Historically, the employment rates of the persons with disabilities correlate with the growth rate of SSI and SSDI.[171] For example, the employment rates of persons with disabilities dropped when SSI and SSDI were expanding during the 1970s, were relatively stable or rising when SSDI and SSI were not expanding during the 1980s, and then began to fall again when SSDI and SSI rose during the 1990s.[172] Mr. Nibali acknowledged that "there's definitely a correlation there."[173] Based on studies conducted by the Social Security Administration, "the number one reason that drives applications to go up or

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[155] Ibid.

[156] Ibid.

[157] Ibid.

[158] *See* Social Security Administration, "Highlights of Social Security Data, July 2000," <http://www.ssa.gov/policy/programs/ssd.html> (Oct. 17, 2000).

[159] Ibid., p. 2.

[160] 42 U.S.C. § 1381a (1994).

[161] SSA, *Redbook on Work Incentives*. SGA is not a factor for SSI applicants who are blind. Ibid.

[162] Ibid.

[163] Ibid.

[164] Ibid. Medicaid benefits provide medical care assistance to eligible needy persons regardless of age. These benefits are federally funded and provided by most states. *See* 42 U.S.C. § 1396 (1994 & Supp. IV 1998).

[165] Ibid.

[166] Ibid.

[167] Ibid.

[168] Kenneth Nibali Testimony, Hearing Transcript, p. 124.

[169] NCD, *Achieving Independence*, Employment, p. 12.

[170] John Bound Testimony, Hearing Transcript, p. 118.

[171] Ibid.

[172] Ibid. *See also* Richard V. Burkhauser, "The Americans With Disabilities Act: Social Contract or Special Privilege?: Are People with Disabilities Expected to Work?" *The Annals of the American Academy of Political Science*, no. 549 (January 1997), pp. 72–74 (hereafter cited as Burkhauser, "Social Contract or Special Privilege").

[173] Nibali Testimony, Hearing Transcript, p. 120.

down for Social Security and SSI benefits is the state of the economy . . . It's a major factor, and it's one that can, in fact, be correlated with unemployment statistics," Mr. Nibali said.[174] He underscored, however, that he does not believe these federal disability programs attract people away from the labor market.[175] Based on a study by the National Academy of Social Insurance, "monetary aspects of the benefits weren't real strong drivers for people either getting on or staying on these rolls . . . [T]he medical benefits are largely what drives the interest of folks."[176]

The younger an individual is who comes on the rolls, the longer he or she is likely to stay on the rolls.[177] Beginning in the 1980s, there has been a rapid growth in cases involving younger beneficiaries between the ages of 15 and 44.[178] While the total number of beneficiaries increased a mere 5 percent in the 1980s, there was a 44 percent increase among those aged between 15 and 44, an increase that far exceeded that of younger persons in other countries.[179] Moreover, between 1990 and 1994, their population shot up 65 percent, while the overall beneficiary population increased by 44 percent.[180]

A number of policy changes may have contributed to this upsurge.[181] First, the definition of mental impairment necessary to receive federal benefits was loosened in the mid-1980s.[182] Second, the burden of proof to remove someone from the benefit rolls increased and continuing disability reviews of such beneficiaries virtually stopped.[183] Third, the 1990 Supreme Court decision in *Sullivan v. Zebley*[184] forced the reexamination of 237,000 children who had previously been denied SSI benefits.[185] As a result of relaxed eligibility standards, more children applied for SSI benefits and became beneficiaries.[186]

This growth is unprecedented in the history of the benefits system and is counter to the goal of integrating people with disabilities into mainstream employment.[187] Rather than easing the transition into retirement for older people, increasingly, the SSI and SSDI programs are being used as alternatives to a more general income maintenance program.[188] This is neither good social policy nor good for the children and young adults who are coming onto these programs.[189] It is particularly disturbing in light of the trend to remain on the disability rolls once benefits begin. On average, a 9-year-old SSI beneficiary will stay on the rolls for about 27 years.[190] The number of applications for SSDI and SSI, however, is declining. Beginning in 1994, the total number of applications for both SSDI and SSI was 2,546,166.[191] By 1998, the number had dropped to 1,996,800.[192] There has been a comparable decline in the number of awards granted. In 1994, total SSDI and SSI awards were 1,167,138.[193] In 1997, the number of awards was 820,134.[194]

The state of the economy has been in a boom for the past eight years, which creates greater employment opportunities. With the enactment of key legislation that will expand health care benefits and provide greater work incentives to working people with disabilities, these numbers

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[174] Ibid., p. 121.

[175] Ibid., p. 122.

[176] Ibid., p. 123.

[177] NCD, *Achieving Independence*, Employment, p. 12.

[178] Burkhauser, "Social Contract or Special Privilege," p. 74.

[179] Ibid.

[180] Ibid.

[181] Ibid.

[182] Ibid.

[183] Ibid.

[184] 493 U.S. 521 (1990) (administrative method to determine whether a child is "disabled," and thus eligible for SSI benefits, held facially invalid as contrary to governing statute, 42 U.S.C. § 1382c(a)(3) (1990)).

[185] Burkhauser, "Social Contract or Special Privilege," p. 74.

[186] Ibid.

[187] Ibid., p. 82.

[188] Ibid.

[189] Ibid.

[190] NCD, *Achieving Independence*, Employment, p. 12. In 1996, a new section was added to the Social Security Act that requires SSA to redetermine the eligibility of a disabled child using the adult disability criteria and without considering whether there has been medical improvement. *See* the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-196 (codified at 42 U.S.C. § 1382c(3)(H)(iii) (Supp. IV 1998)). This will affect the average length of time children are on the SSI rolls.

[191] Social Security Administration, Office of Disability, *Social Security and Supplemental Income Disability Applications, Total Applications, Awards, Denials, Allowance Rate & Denial Rate, Calendar Years 1990–1998* (1999).

[192] Ibid.

[193] Ibid.

[194] Ibid. Decisional data for 1998 applicants were not available because many claims and appeals were still pending. Ibid.

may decline even further. While the Social Security system is based on the notion that a person can be determined "too disabled to work," evolution in knowledge, policy, and practice has demonstrated that individuals with disabilities can work if they have access to appropriate support services, accommodations, and health care.[195] Furthermore, the aforementioned policy changes demonstrate that the ADA is not at the root of the high unemployment rate of individuals with disabilities. Other factors, such as the state of the economy and changes in the law, contribute to the dearth of individuals with disabilities in the work force.

Health Care and Health Insurance Benefits

People with disabilities have increasingly identified the lack of access to adequate health care and health insurance as a major obstacle to employment and independent living.[196] "The original ADA . . . would have gone a long way to dealing with the major obstacle for many disabled people, and that is the inability to get health care coverage at any cost."[197] Insurance companies generally regard people as high risk, in terms of health care costs, when they become disabled or have a family history of disability.[198] Few private health insurance plans have adequate coverage, due to pre-existing condition exclusions, minimal benefit packages, and benefit caps.[199] Furthermore, private health insurance plans rarely provide for the long-term services and supports people with disabilities need.[200] With the accompanying escalating costs of health care and health insurance, people with disabilities find it increasingly difficult to meet their needs through private insurance.[201]

As a result, people with disabilities are less likely to have private health insurance coverage and more likely to have government coverage than those without disabilities.[202] Among individuals aged 22–64 with nonsevere disabilities,[203] 71.1 percent were covered by a private health insurance plan and 6.1 percent had only government coverage.[204] The effect of a disability on the likelihood of having private coverage was more marked among those with severe disabilities; only 43.7 percent of people with severe disabilities aged 22–64 had private coverage while 39.6 percent had only government coverage.[205]

Medicare and Medicaid provide the lion's share of federally supported health care insurance.[206] Medicare helps pay hospital and doctor bills of individuals with disabilities or retirees who have worked long enough to be insured for Social Security benefits.[207] It generally covers people who are 65 and older, people who have been determined to be disabled and have been receiving benefits for at least 24 months, and persons with end-stage renal disease (permanent kidney failure requiring dialysis or transplant).[208] The hospital-cost insurance program, known as Part A, is usually provided free of charge.[209] Most people do not have to pay a premium for Part A because they or a spouse paid Medicare taxes while they were working.[210] Part A benefits include inpatient hospital services, post-hospital extended care services, home health services, and hospice care.[211] Under Part B of Medicare, eligible individuals must pay a premium to obtain insurance for the costs of physicians' services.[212] These services include

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[195] NCD, *Achieving Independence*, Employment, p. 12.

[196] Ibid., p. 18.

[197] Bristo Testimony, Hearing Transcript, p. 69.

[198] NCD, *Achieving Independence*, p. 19.

[199] Ibid.

[200] Ibid.

[201] Ibid.

[202] U.S. Department of Commerce, Bureau of the Census, *Current Population Reports—Americans With Disabilities: 1994–95*, by John M. McNeil (Washington, D.C.: Government Printing Office, 1997), p. 4 (hereafter cited as Census Bureau, *Current Population Reports*).

[203] *See* McNeil, "One in 10," for the Census Bureau's definition of disability.

[204] Census Bureau, *Current Population Reports*, p. 4.

[205] Ibid.

[206] Kenneth S. Abraham and Lance Liebman, "Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and injury," *Columbia Law Review*, no. 93 (January 1993), p. 83 (hereafter cited as Abraham, "Private Insurance").

[207] 42 U.S.C. § 1395c (1994).

[208] 42 U.S.C. § 1395c.

[209] 42 U.S.C. § 1395d (Supp. IV 1998).

[210] Health Care Financing Administration, "Medicare Basics," n.d., <http://www.medicare.gov/Basics/PartAandB.asp> (May 24, 2000), p. 2.

[211] 42 U.S.C. § 1395d.

[212] Health Care Financing Administration, "Medicare Basics," n.d., <http://www.medicare.gov/Basics/PartAandB.asp> (May 24, 2000), p. 2.

outpatient hospital care and other medical services that Part A does not cover, such as the services of physical and occupational therapists.[213]

Title XIX of the Social Security Act is a program that provides medical assistance for certain individuals and families with low incomes and resources.[214] This program, known as Medicaid, became law in 1965 as a jointly funded cooperative venture between the federal and state governments to assist states in the provision of adequate medical care to eligible needy persons regardless of age.[215] It provides two essential forms of assistance to individuals with disabilities: prescription drugs and the services of attendants who assist them with personal tasks.[216] Medicaid is virtually the only source of reimbursement for long-term services and supports.[217] The amount of assistance provided varies considerably from state to state.[218] In most states, individuals who qualify for SSI disability payments also qualify for Medicaid.[219]

There has been a significant expansion of Medicaid and Medicare that is due, in part, to escalating restrictions from private insurers. These restrictions have increasingly pushed high-risk, high-utilization people with disabilities into public sector programs.[220] Those who are working part time are at an even greater risk of being uninsured because they are likely to be ineligible both for an employer's group coverage and for public coverage, which is generally available only to those who are determined by the SSA to be "too disabled to work."[221] While public health care and health insurance are helpful, they are not cure-alls. Reimbursement for long-term services and supports is generally unavailable to those who are working.[222] The inability to obtain private health insurance, coupled with work restrictions on benefits, is discouraging to individuals with disabilities and serves as a disincentive to work.[223] Ultimately, these factors depress the employment rate of people with disabilities.

SSA Work Incentives

The SSA reports that about 7,000 SSDI beneficiaries leave the rolls each year due to work activity.[224] Approximately 60,000 disabled and blind SSI recipients are working and no longer receiving benefits, and that number has increased by approximately 3,000 to 5,000 annually in recent years.[225] It is estimated that an additional 4,800 SSDI and 3,000 SSI beneficiaries would leave the benefit rolls due to work each year, beginning in fiscal year 2000, with the implementation of new return-to-work initiatives.[226] These findings suggest that with the proper work incentives more beneficiaries would seek work. Work incentives are imperative to meeting the ADA's objective to integrate individuals with disabilities into community life, particularly into the employment arena.

Before the enactment of the ADA, there were a number of work incentive initiatives included in the Social Security disability benefits program to encourage beneficiaries with disabilities to try to work. Under the SSDI program, there are several work incentives for persons with disabilities. The trial work period (TWP) allows SSDI beneficiaries to test their ability to work for at least nine months in spite of their disability.[227] SSDI beneficiaries continue to receive their full benefits during the TWP, regardless of how much they earn, provided they have a disabling impairment.[228] In addition, SSDI beneficiaries can receive at least 39 months of continued Medicare coverage after the trial work period, even though cash benefits may cease.[229] There is a Medicare buy-in option for SSDI beneficiaries

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[213] Ibid.

[214] 42 U.S.C. §§ 1396–1396v (1994 & Supp. IV 1998).

[215] *See* 42 U.S.C. § 1396.

[216] 42 U.S.C. § 1396d(a)(12), (14) (Supp. IV 1998).

[217] NCD, *Achieving Independence*, Employment, p. 21.

[218] Health Care Financing Administration, "Overview of the Medicaid Program," n.d., <http://www.hcfa.gov/medicaid/mover.htm> (May 24, 2000), p. 1.

[219] Health Care Financing Administration, "Medicaid Eligibility," n.d., <http://www.hcfa.gov/medicare/meligib.htm> (May 24, 200), p. 1.

[220] Ibid., p. 19.

[221] Ibid., p. 20.

[222] Ibid., p. 21.

[223] Ibid., p. 20.

[224] Social Security Administration, Response to Interrogatories by U.S. Commission on Civil Rights, May 18, 1999, tab D, p. 1.

[225] Ibid.

[226] Ibid.

[227] SSA, *Redbook on Work Incentives*, p. 24.

[228] Ibid.

[229] Ibid., p. 27.

whose premium-free Medicare coverage ended due to work. These benefits apply to those beneficiaries under 65 years of age with a disabling impairment.[230] After a successful trial work period, SSA also provides an extended period of eligibility (EPE), which provides a consecutive 36-month period during which cash benefits will be reinstated for any month in which a beneficiary with a disability does not work at the SGA level, without the need to file a new application for disability benefits.[231] Although these benefits are time limited, they do provide a beneficiary some opportunity to work without losing essential cash and insurance benefits.

The SSI disability program also provides work incentives for persons with disabilities. SSI beneficiaries with disabilities can receive SSI cash payments even when earned income exceeds the SGA, if the beneficiary has been eligible for an SSI payment for at least one month before working at the SGA level; continues to be disabled; and meets all other eligibility rules, including the income and resource test.[232] The monthly SSI payment for working beneficiaries is calculated in the same manner as before they started to work. Moreover, working SSI beneficiaries with a disability are eligible for continued Medicaid coverage when their earnings and income become too high for SSI cash payments.[233] To qualify, the person must have been eligible for an SSI cash payment for at least one month; still meet the disability requirements for SSI; need Medicaid in order to work; and have gross earned income that is insufficient to replace SSI, Medicaid, and any publicly funded attendant care.[234]

Pursuant to both programs, the costs of certain impairment-related items and services the person needs to work are deducted from gross earnings in determining whether the person's earnings represent SGA.[235] The value of any subsidies received on the job is also deducted from gross earnings in determining whether the person's earnings represent SGA.[236] As individuals' gross earnings are decreased, it becomes less likely that their income will exceed SGA and that their disability benefits will be terminated. Generally, SSDI and SSI disability benefits are terminated if the beneficiary's condition medically improves and the beneficiary is no longer considered "disabled." However, SSDI and SSI disability benefits will continue if, at the time the disability medically ceases, the person is actively participating in an approved state or nonstate public or private vocational rehabilitation program, and completion or continuation of the program is likely to enable the person to work permanently.[237]

To counter the dependency on federal disability benefits, the SSA has created these work incentive programs to remove employment barriers and encourage beneficiaries to work and lead independent lives—two of the primary objectives of the ADA. For a working beneficiary, however, SSDI cash benefits are generally terminated after one year once average earnings exceed $700,[238] or for SSI purposes, when earnings plus other income exceed the income and resource test. Under SSDI, cash benefits will continue even after a year of returning to work, but only if the beneficiary's average monthly earnings do not exceed the SGA of $700. In sum, in the event that a beneficiary earns more than $700 a month, he or she can no longer rely on government assistance to help defray the costs of working with a disability.

Because many people leaving the Social Security disability program often take minimum-wage jobs, their income from working is not sufficient to cover basic living expenses, particularly disability-related expenses that are typically covered by public health insurance.[239] The minimum wage is currently $5.15 per hour.[240] At the minimum wage rate, if a person with a disability were able to work an average work week of 40 hours, his or her monthly earnings would

[230] Ibid., p. 28.

[231] Ibid., p. 25.

[232] Ibid., p. 40.

[233] Ibid., p. 41.

[234] Ibid.

[235] Ibid., p. 21.

[236] Ibid., p. 26.

[237] Ibid., p. 28.

[238] As mentioned previously, some disability-related work expenses are deducted from a beneficiary's gross earnings, which lowers the amount of earnings subject to the SGA requirement.

[239] NCD, *Achieving Independence*, p. 17.

[240] Department of Labor, "Wage, Hour and Other Workplace Standards," *Small Business Handbook*, December 1999, <http://www.dol.gov/dol/asp/public/programs/handbook/minwage. htm> (July 20, 2000), p. 1.

be approximately $824—well over the earnings limit under SSDI. While some working people with disabilities can only work part time, these figures demonstrate how easy it is to exceed the SGA as a working person with a disability becomes a part of mainstream life. At the same time, once a working beneficiary's cash benefits are terminated, he or she is earning only minimum wages. It may be difficult for some persons with disabilities to live on this small income while incurring necessarily work-related expenses.

In addition, Kenneth D. Nibali of the Social Security Administration pointed out that "an awful lot of people aren't even aware of [Social Security work incentive programs] and, quite frankly, some of our employees aren't as good about explaining these things to people as we'd like them to be."[241] The rates of Social Security benefit terminations due to beneficiaries returning to work have always been modest, but have reached all-time lows.[242] Despite the work incentive programs' shortcomings, Mr. Nibali believes that the number of beneficiaries leaving the Social Security disability rolls to return to work could increase with the introduction of the Ticket to Work and Work Incentives Improvement Act.

Recent Legislative and Executive Action Incentifying Work

Ticket to Work and Work Incentives Improvement Act

On December 17, 1999, President Clinton signed into law the Ticket to Work and Work Incentives Improvement Act (WIIA).[243] Commenting on the WIIA, President Clinton stated, "Together, these provisions affirm the basic principle manifested in ADA—that all Americans should have the same opportunity to be productive citizens."[244] The act expands Medicaid and Medicare so that people with disabilities can retain their health benefits when they return to work. Under current law, individuals with disabilities risk losing Medicaid and Medicare coverage if they have significant earnings.[245] This legislation will attempt to remove these barriers by:

- Creating new options and incentives for states to provide a Medicaid "buy-in" option for workers with disabilities.[246]
- Lengthening from 4 years to 8½ years the period for which Social Security disability beneficiaries who return to work can continue to receive reduced-cost Medicare coverage.[247]
- Providing SSDI and SSI disability beneficiaries with a ticket they may use to obtain vocational rehabilitation services, employment services, and other support services from an employment network of their choice.[248]
- Enabling individuals with disabilities to reestablish eligibility for Social Security disability benefits on an expedited basis if their attempts to return to work prove to be unsuccessful.[249]

In short, the WIIA is intended to expand the availability of health care coverage for working adults.[250] While noting that greater employment opportunities for people with disabilities have been "aided by important public policy initiatives such as the Americans with Disabilities Act," the WIIA recognizes that "fewer than one-half of one percent of Social Security Disability Insurance and Supplemental Security Income beneficiaries leave the disability roll and return to work."[251] Senator Jim Jeffords (R-VT), one of the authors of the legislation, said the WIIA will "open doors to jobs across the country for disabled Americans."[252]

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[241] Nibali Testimony, Hearing Transcript, p. 131.

[242] Jerry L. Mashaw, Virginia Reno, et al., eds., *Disability, Work and Cash Benefits*, "Overview" (Michigan: W.E. Upjohn Institute for Employment Research, 1996), p. 2.

[243] Pub. L. No. 106-170, 113 Stat. 1860 (1999). The expanded health care provisions became effective Oct. 1, 2000. The Ticket to Work portion of this law will be phased in nationally over a three-year period beginning Jan. 1, 2001 (to be codified at scattered sections of 42 U.S.C.).

[244] *Federal EEO Advisor*, "Clinton signs disability legislation," vol. 2, no. 12 (Jan. 20, 2000).

[245] *See* 42 U.S.C. §§ 423(d), 1382c.

[246] Pub. L. No. 106-170, § 201, 113 Stat. 1860, 1891–94.

[247] Pub. L. No. 106-170, § 202, 113 Stat. 1860, 1894.

[248] Pub. L. No. 106-170, § 101, 113 Stat. 1860, 1863–81.

[249] Pub. L. No. 106-170, § 112, 113 Stat. 1860, 1881–87.

[250] Pub. L. No. 106-170, 113 Stat. 1862.

[251] Pub. L. No. 106-170, 113 Stat. 1862–63.

[252] *Federal EEO Advisor*, "Congress approves disability legislation," vol. 2, no. 11 (Dec. 16, 1999), p. 1.

On the day of its congressional passage, John Lancaster, executive director of the President's Committee on Employment of People with Disabilities, said the WIIA is a "step in the right direction" but that the legislation should not be viewed as a "panacea."[253] At the Commission's ADA hearing, before the bill was enacted, Marca Bristo, chairperson of the National Council on Disability, noted that the proposed Work Incentives Improvement bill in 1998 "would have gone *one step* toward eradicating the health care obstacle for people with disabilities."[254] According to Ms. Bristo, "until the rest of our public policy follows the paradigm shift and begins to believe the same things that the ADA does, that we can work, should work and we begin to take a part in the public policies that keep us from working . . . work doesn't pay for disabled people."[255]

Workforce Investment Act of 1998

The purpose of the Workforce Investment Act is to consolidate, coordinate, and improve employment, training, literacy, and vocational rehabilitation programs.[256] Title IV of the act amends the Rehabilitation Act of 1973. The purpose of Title IV is to "empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society . . . through statewide workforce investment systems implemented in accordance with Title I of the Workforce Investment Act."[257] Title I of the act streamlined dozens of federal job-training programs and created "one-stop" job centers that provide information, counseling, and training services under one roof.[258] State and local governments receive federal funds, which local "workforce investment boards" then use to design the one-stop centers.[259] All community residents, including individuals with disabilities, may tap the services that the one-stop centers provide. In sum, this act provides greater access to vocational training for persons with disabilities who want to enter the work force.

Medicaid Buy-In Option

Section 4733 of the Balanced Budget Act of 1997 amends Title XIX of the Social Security Act (Medicaid) to provide a new Medicaid buy-in option for people with disabilities.[260] This provision gives states the option to allow individuals with disabilities who return to work the ability to purchase Medicaid coverage as their earnings increase up to 250 percent of the poverty level.[261] This option provides a greater incentive for people with disabilities to return to work while relying on some public assistance. These individuals can ease into employment and ultimately integrate into mainstream society.

Health Insurance Portability and Accountability Act of 1996

The Health Insurance Portability and Accountability Act is designed to protect health insurance coverage for workers and their families when they change or lose jobs.[262] To meet this objective, the act's provisions guarantee that private health insurance is accessible, portable, and renewable.[263] The act limits pre-existing condition exclusions for group health plans.[264] The statute also prohibits discrimination against individual participants and beneficiaries based on health status.[265] Some of the health status-related factors include medical conditions (including both physical and mental illnesses), medical history, and genetic information.[266] These provisions are particularly beneficial for individuals with disabilities who want to work but who are typically excluded from private health insurance plans because of their disability. As a result of this legislation, people with

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[253] Ibid.

[254] Bristo Testimony, Hearing Transcript, p. 69 (emphasis added).

[255] Ibid., pp. 69–70.

[256] Pub. L. No. 105-220, 112 Stat. 936 (1998) (codified in scattered sections of 20 U.S.C.A. & 29 U.S.C.A. (1999 & Supp. 1999)).

[257] 29 U.S.C.A. § 701(b) (1999 & Supp. 1999).

[258] *See* 29 U.S.C.A. § 2841.

[259] *See* 29 U.S.C.A. §§ 2821–2833.

[260] 42 U.S.C. § 1396a(a)(10)(ii) (1994).

[261] 42 U.S.C. § 1396a(a)(10)(ii).

[262] Health Care Financing Administration, "Health Insurance Portability and Accountability Act," n.d., <http://www.hcfa.gov/regs/hipaacer.htm> (July 20, 2000), p. 1.

[263] Codified in scattered sections of 29 U.S.C.A. & 42 U.S.C.A. (Supp. 1999).

[264] 29 U.S.C.A. § 1181 (1999); 42 U.S.C.A. § 300gg (Supp. 1999).

[265] 29 U.S.C.A. § 1182; 42 U.S.C.A. § 300gg-1.

[266] 29 U.S.C.A. § 1182(a)(1); 42 U.S.C.A. § 300gg-1(a)(1).

disabilities can choose among an array of insurance providers to ensure that they obtain the best coverage for the lowest cost.

Mental Health Parity Act of 1996

The Mental Health Parity Act begins the process of ending the longstanding practice of providing less insurance coverage for mental illnesses, or brain disorders, than is provided for equally serious physical disorders.[267] The act includes a provision that prohibits insurance companies from having lower lifetime caps for treatment of mental illness compared with treatment for other medical and surgical conditions.[268] Typical caps for mental illness coverage are $50,000 for lifetime and $5,000 for annual, as compared with $1 million for lifetime and no annual cap for other physical disorders.[269] The law covers only mental illnesses; it does not cover treatment of substance abuse or chemical dependency.[270] The principal beneficiaries of the act will be persons with the most severe, persistent, and disabling of brain disorders because they are, on average, more likely to exceed annual and lifetime benefits.[271] The law expires on September 30, 2001.[272]

S. 1935

Senators Tom Harkin (D-IA) and Arlen Specter (R-PA) introduced S. 1935, known as the Medicaid Community Attendant Services and Supports Act, in November 1999.[273] The bill would amend Title XIX of the Social Security Act to provide Medicaid coverage for community attendant services and supports for eligible individuals with disabilities.[274] While Medicaid must provide nursing home services, community-based services are not always available.[275] Individuals with disabilities, both old and young, have wanted alternatives to nursing homes and other institutions when they need long-term services.[276] This bill will give individuals with disabilities the power to choose where and how they receive attendant services and supports, and allow them to integrate more easily into mainstream life.

Prohibition of Discrimination Based on Genetic Information

On February 10, 2000, President Clinton issued an executive order reinforcing the prohibition of discrimination against federal employees based on genetic information.[277] Genetic information includes "information about the occurrence of a disease, or medical condition or disorder in family members of the individual."[278] Title I of the ADA prohibits genetic discrimination, even though the law does not specifically refer to it.[279] Covered entities that discriminate against individuals on the basis of such genetic information are regarding the individuals as having impairments that substantially limit a major life activity.[280] Pursuant to the ADA, "disability" includes "being regarded as having such an impairment."[281]

Presidential Task Force on Employment of Adults with Disabilities

Pursuant to Executive Order 13078, President Clinton established the Presidential Task Force on Employment of Adults with Disabilities

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[267] National Alliance for the Mentally Ill, "The Mental Health Parity Act of 1996," n.d., <http://www.nami.org/update/parity96.html> (July 20, 2000), p. 1.

[268] 29 U.S.C.A. §§ 1185a(a)(1)(A) (1999); 42 U.S.C.A § 300gg-5(a)(1)(A) (Supp. 1999).

[269] National Alliance for the Mentally Ill, "The Mental Health Parity Act of 1996," n.d., <http://www.nami.org/update/parity96.html> (July 20, 2000), p. 1.

[270] Ibid.

[271] Ibid., p. 3.

[272] Ibid., p. 1.

[273] S. 1935, 106th Cong. (1999).

[274] S. 1935.

[275] 42 U.S.C. § 1396d(a)(4)(A), (a)(23) (1994).

[276] American Disabled for Attendant Programs Today (ADAPT), "A Community-Based Alternative to Nursing Homes and Institutions for People with Disabilities," n.d., <http://www.adapt.org/casaintr.htm> (June 21, 2000), p. 1.

[277] Executive Order 13145, 65 Fed. Reg. 6,877 (2000). The order clarifies and makes uniform administration policy and does not create a right or benefit, substantive or procedural, enforceable at law by a party against the United States, its officers or employees, or any other person. Ibid., p. 6789.

[278] Ibid.

[279] Equal Employment Opportunity Commission, Compliance Manual, *Americans with Disabilities Act Manual* (BNA), 1995, p. 88. *See also* "EEOC Commissioner Miller Says Title I of ADA Prohibits Genetic Discrimination," *Daily Labor Report* (BNA), Mar. 27, 2000, p. A-4.

[280] Equal Employment Opportunity Commission, Compliance Manual, *Americans with Disabilities Act Manual* (BNA), 1995, p. 88.

[281] 42 U.S.C. § 12102(2)(C).

(Task Force).[282] The purpose of the Task Force is to create a coordinated and aggressive national policy to bring adults with disabilities into gainful employment at a rate that is as close as possible to that of the general adult population.[283] To achieve that purpose, the Task Force is working on interagency strategies to reduce employment barriers for persons with disabilities.[284]

The Task Force was required to issue its first report to the President by November 15, 1998.[285] The report noted that adults with severe disabilities are one of the largest minorities in the nation without jobs.[286] Vice chair of the Task Force, Tony Coelho, outlined the challenges in achieving the goals of the executive order:

> Challenge number one is health care. Too many adults with disabilities remain on public assistance because it is their only way to access health care. Challenge number two is economic incentives. It is necessary that adults with disabilities who go to work improve their overall economic situation. Challenge number three is ensuring support for those adults who want to work. Supported work, natural supports, personal assistance services, and other accommodations must become the norm for those who need them. Finally, challenge number four is increasing access to education, training, and rehabilitation services.[287]

To help meet its health care initiative, the Task Force recommended that the President support the passage of the Ticket to Work and Work Incentives Improvement Act, which was ultimately passed.[288] The Task Force also recommended that the President direct the Department of Treasury to examine tax options to assist adults with disabilities in paying for expenses related to work.[289] Working-age adults with disabilities often have a disincentive to work because of the high cost of personal attendant services or technologies required for employment.[290] Similarly, the cost to employers of hiring an individual requiring personal attendant services can be prohibitive.[291] Tax credits provide a flexible way to assist people with disabilities in defraying these expenses.[292]

Currently, there are a number of tax incentives available to help employers cover the cost of accommodations for employees with disabilities and to make their places of business accessible for employees with disabilities. John Lancaster of the President's Committee on Employment of People with Disabilities thinks that true economic incentives need to be in place for the individual and employer. In his opinion, there has to be real economic incentive for the employer to hire people with disabilities that extends beyond "some Mickey Mouse tax credit that Congress renews every few years."[293] Following is a list of a few significant tax incentives available to employers:

- **Disabled Access Credit.** Shortly after the ADA was enacted, the Revenue Reconciliation Act of 1990 amended the tax code to provide tax relief to small businesses that incur eligible costs when complying with the ADA.[294] Small businesses are eligible if, in the previous year, they earned a maximum of $1 million in revenue or had 30 or fewer full-time employees.[295] The credit is 50 percent of expenditures over $250, not to exceed $10,250, for a maximum benefit of $5,000.[296]
- **Architectural/Transportation Tax Deduction.** Businesses may take an annual deduction for expenses incurred to remove physical, structural, and transportation barriers for persons with disabilities in the workplace.[297] All businesses are eligible, regardless of size or revenue.[298] Businesses may take a tax deduction of up to $15,000 a year

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[282] Exec. Order No. 13078, 3 C.F.R. § 140 (1999), *reprinted in* 29 U.S.C.A. § 701 (1999 & Supp. 1999).

[283] 3 C.F.R. § 140.

[284] 3 C.F.R. § 140.

[285] 3 C.F.R. § 141.

[286] Presidential Task Force, *Recharting the Course: First Report of the Presidential Task Force on Employment of Adults*, Executive Summary, Dec. 4, 1998, p. 1.

[287] Ibid., Foreword.

[288] Ibid., chapter 1, p. 1.

[289] Ibid., pp. 1–2.

[290] Ibid., p. 2.

[291] Ibid.

[292] Ibid.

[293] Lancaster Testimony, Hearing Transcript, p. 186.

[294] Pub. L. No. 101-508, § 1161(a), 104 Stat. 1388 (1990) (codified at 26 U.S.C. § 44 (1994)).

[295] 26 U.S.C. § 44(b)(1).

[296] 26 U.S.C. § 44(c).

[297] 26 U.S.C. § 190 (1994).

[298] 26 U.S.C. § 190(b)(1).

for expenses incurred to remove barriers to persons with disabilities.[299]

- **Work Opportunity Tax Credit.** This tax credit replaces the Targeted Jobs Tax Credit program, and provides a tax credit for employers who hire certain targeted low-income groups, including vocational rehabilitation referrals.[300] An employer may take a tax credit of up to 40 percent of the first $6,000, or up to $2,400, in wages paid during the first 12 months for each new hire.[301] This measure is effective from October 1, 1997, through July 1, 2001, and is subject to annual congressional renewal.[302]

On January 13, 1999, President Clinton announced a new proposal that would allow workers with significant disabilities to receive an annual $1,000 tax credit to help cover the formal and informal costs associated with employment, such as special transportation and technology.[303] Disability advocates believe that providing economic incentives is an effective means for getting individuals with disabilities to leave the disability rolls to go to work.[304] Like the Work Incentives Improvement Act, this tax credit will ensure that people with disabilities have the tools they need to return to work.[305] Congress recently approved the measure.[306]

A Proposal to Amend the ADA: H.R. 3590

This bill is intended to amend Title III of the Americans with Disabilities Act to require, as a precondition to commencing a civil action regarding a place of public accommodation or a commercial facility, an opportunity to correct alleged violations.[307] The proposed bill would require a 90-day notification period,[308] which, in effect, stalls an individual's right to file a lawsuit upon detecting an ADA violation. The bill's supporters maintain that there has been a flood of ADA lawsuits that have generated large sums of attorneys' fees, while the victim, or person with a disability, is barred from receiving any damages.[309] Under Title III of the ADA, plaintiffs who file lawsuits to compel compliance with ADA access requirements are banned from receiving damage awards when they sue individually.[310] Mark Foley (R-FL), one of the authors of the bill, said that "the ADA is being used by some attorneys to shake down thousands of businesses from Florida to California. And they're doing so at the expense of people with disabilities."[311]

There was a public hearing held by the House Judiciary Subcommittee on the Constitution on May 18, 2000. Several business representatives, some with disabilities, and private individuals with disabilities testified at the hearing. Clint Eastwood also testified, as he was recently subject to an ADA lawsuit for an alleged failure to provide wheelchair access to certain rooms at his Mission Ranch in Carmel, California. While Chairman Canady praised the ADA for providing a more accessible environment for people with disabilities, he also believed that this absence of a notice provision can be exploited and create "ill will between the disabled community and small property owners who would in good faith bring properties into compliance with the ADA if only they were alerted to the law's requirements."[312] The measure is still pending in the Committee on the Judiciary.

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[299] 26 U.S.C. § 190.

[300] 26 U.S.C. § 51 (1994 & Supp. IV 1998).

[301] 26 U.S.C. § 51(a)–(b).

[302] President's Committee on Employment of People with Disabilities, "Tax Incentives for Business," n.d., <http://www.50.pcepd.gov/pcepd/ztextver/archives/pubs/ek97/tax.htm> (May 4, 2000), p. 3.

[303] National Council on Disability, *A Progress Report: November 1, 1998–November 19, 1999* (2000), p. 48 (hereafter cited as NCD, *Progress Report*).

[304] Lancaster Testimony, Hearing Transcript, p. 185.

[305] NCD, *Progress Report*, p. 48.

[306] Ibid.

[307] H.R. 3590, 106th Cong. (2000).

[308] Ibid.

[309] Statement by Mark Foley, Subcommittee on the Constitution, House Committee on the Judiciary, May 18, 2000 (hereafter cited as Foley Statement). *See also* Statement by E. Clay Shaw Jr., Subcommittee on the Constitution, House Committee on the Judiciary, May 18, 2000.

[310] 42 U.S.C. § 12188(a)(1) (1994). Monetary damages are available if the Attorney General sues on behalf of an individual. 42 U.S.C. § 12188(b)(2)(B).

[311] Foley Statement.

[312] Statement of Chairman Charles T. Canady, Subcommittee on the Constitution, House Committee on the Judiciary, Washington, D.C., May 18, 2000.

CHAPTER 3

Judicial Trends in ADA Enforcement

With today's signing of the landmark Americans with Disabilities Act, every man, woman and child with a disability can now pass through once-closed doors into a bright new era of equality, independence and freedom.[1]

Opening doors to true equality was the vision for the Americans with Disabilities Act when it was signed into law. The ADA's vision, like those for other federal laws, will be realized or clouded by how it is interpreted by the Supreme Court of the United States. Many of the panelists who testified at the Commission's ADA hearing anticipated the issues that the Supreme Court would be addressing—few predicted the results. The Supreme Court in a series of decisions has now given its view on some of the cutting issues raised by the ADA. Is the ADA's vision of having all Americans with disabilities "pass through once-closed doors into a bright new era of equality, independence and freedom" still intact after the Supreme Court has spoken?[2]

When the American Bar Association's (ABA) *Mental & Physical Disability Law Reporter* published its first survey of Title I employment cases under the ADA, it found that employees prevailed in only 8 percent of the final court decisions for cases brought from 1992 through 1997.[3]

In 1998, the second annual survey found the "percentage of employer victories increased from about 92 percent to about 94 percent";[4] in 1999, employees were even more unsuccessful, prevailing "in only 4.3 percent of the cases in which a final decision was rendered, while employers prevailed 95.7 percent of the time."[5] Moreover, an analysis of EEOC's administrative complaints revealed that employers prevailed in 86 percent of the administrative complaints resolved by the EEOC from 1992 through 1997, and over 85 percent in both 1998 and 1999.[6]

The results of the ABA's three surveys show that employees have lost and continue to lose the vast majority of ADA discrimination claims. Most significant is data that show that only 12 percent of the claims filed were resolved on the merits. In fact, in the majority of claims filed, "employers prevailed summarily without addressing the merits of the employees' claims."[7]

The reasons employers succeed in a significant percentage of disability cases brought under Title I of the ADA, the ABA suggests, is that the "procedural and technical requirements contained in the ADA, as interpreted by the courts, create difficult obstacles for plaintiffs to over-

[1] President George Bush's Statement on Signing the Americans with Disabilities Act of 1990, *Public Papers of the Presidents of the United States, George Bush* (1990), book 2, p. 1079, *reprinted in* 1990 U.S.C.C.A.N., pp. 601–02.

[2] This chapter does not review all Supreme Court cases analyzing the ADA but only addresses those decisions handed down after the Commission's ADA hearing, which was held Nov. 12–13, 1998.

[3] American Bar Association, "Trend: Employment Decisions Under ADA Title I—Survey Update," *Mental & Physical Disability Law Reporter*, vol. 23, no. 3 (May/June 1999), p. 294. The results of the ABA survey were consistent with EEOC's data, which showed that employees were successful in only about 14 percent of the administrative complaints the EEOC handled. Ibid.

[4] John Parry, "American Bar Association Survey on Court Rulings Under Title I of the Americans with Disabilities Act," *Daily Labor Report* (BNA), June 22, 1998, p. D-25. Mr. Parry is the director of the ABA Commission on Mental and Physical Disability Law and editor-in-chief of the *Mental & Physical Disability Law Reporter*.

[5] Parry, "Trend: 1999 Employment Decisions Under the ADA Title I—Survey Update," p. 348.

[6] Ibid., p. 350.

[7] Ibid., pp. 349–50.

come."[8] According to the ABA, the obstacles include:

> satisfying the requirements that the plaintiff meet the ADA's restrictive definition of disability—a physical or mental impairment that substantially limits a major life activity—and still be qualified to meet essential job functions with or without reasonable accommodation. In addition, plaintiffs can be disqualified from prevailing on their discrimination claims if they apply for or receive disability benefits, pose a "direct threat" to health and safety of themselves or others, fail to report that they have a disability or request an accommodation, or request an accommodation that poses an "undue hardship" on the employer.[9]

Employers argue that the number of case dismissals is due, in large part, to the vast number of frivolous claims that are brought under the ADA. These employer advocates assert that courts are dismissing cases in an attempt to preserve the definition of disability originally intended by Congress.[10] Representatives for individuals, on the other hand, assert that the ADA is not achieving its potential. These advocates argue that individuals with impairments lose in court because the evidence of disability they offer is used against them when they try to prove they are able to perform the job. According to advocates for individuals with disabilities, this Catch-22 is depriving individuals of the opportunity to have their disability discrimination allegations decided on the merits.[11]

Several controversies developed as courts attempted to define the class of individuals entitled to ADA's protections. Two issues, "mitigating measures" and "judicial estoppel," created disagreement among the federal Courts of Appeals and were eventually addressed by the Supreme Court. Additionally, the Supreme Court rendered several other decisions interpreting the ADA. This chapter examines these legal developments, the policy arguments made by interested parties, and the future implications of these decisions.

Who Is Entitled to Protection under the ADA?

Contrary to the general certainty associated with one's race, sex, or age . . . what constitutes a "disability" under the ADA is an issue which is far from certain.[12]

To gain protection under most civil rights statutes, an individual must first show that he or she is within the class of people the law was intended to protect. Under other civil rights laws prohibiting discrimination, proof that one is of a certain race, gender, or age is relatively easy, as these characteristics tend to be readily apparent. For example, under the Age Discrimination in Employment Act (ADEA)[13] one can demonstrate age by merely showing a driver's license or other form of personal identification containing a date of birth.[14]

According to the EEOC Compliance Manual, "[u]nlike Title VII and the ADEA, under which the charging party's status as a member of a protected group is seldom in doubt, coverage is frequently a significant issue in ADA cases. In such

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[8] Ibid., pp. 348–50.

[9] Ibid., p. 350.

[10] Ann E. Reesman, testimony before the U.S. Commission on Civil Rights, hearing, Washington, D.C., Nov. 12–13, 1998, transcript, p. 178 (hereafter cited as Hearing Transcript). Ms. Reesman is general counsel of the Equal Employment Advisory Council, a nonprofit association whose stated purpose is to promote sound approaches to eliminating employment discrimination. Its members include over 300 of the nation's largest private sector employers. Ibid., pp. 156, 161. In an interview with Commission staff, Lisa Hogan, an attorney who represents employers, said many complaints are frivolous and courts are defining disability appropriately. Telephone interview, Oct. 13, 1998. Ms. Hogan is a shareholder of the law firm Brownstein, Hyatt, Farber & Strickland, where she most often represents employers in discrimination cases. Lisa Hogan Testimony, Hearing Transcript, pp. 216, 224. Another employer representative opined that courts are not undermining congressional intent. Dana S. Connell, telephone interview, Oct. 6, 1998. Mr. Connell is a partner in the law firm of Littler, Mendelson. Dana Connell Testimony, Hearing Transcript, p. 215.

[11] James G. Frierson, Hearing Transcript, pp. 227–29, 262–63. James G. Frierson is a professor at East Tennessee State University in the College of Business. Ibid., p. 216. *See also* Robert Burgdorf Jr., Hearing Transcript, pp. 51–54. Robert Burgdorf Jr. is a professor of law at the University of the District of Columbia, David A. Clarke School of Law. Burgdorf Testimony, Hearing Transcript, p. 26.

[12] Adam C. Wit, "Should 'Mitigating Measures' Be Considered in the 'Disability' Analysis under the ADA?" *Employee Relations Law Journal*, vol. 24, no. 1 (Summer 1998), p. 74 (hereafter cited as Wit, "Should 'Mitigating Measures' Be Considered").

[13] 29 U.S.C. §§ 621–634 (1994).

[14] Frierson Testimony, Hearing Transcript, pp. 228–29.

cases, it is necessary to determine whether the individual has a disability *and* is qualified."[15] These terms are not defined in the ADA, but the agencies with primary authority for enforcing its provisions have attempted to add workable substance to these concepts.[16] Additionally, in three cases decided after the Commission's ADA hearing, the Supreme Court answered the question of whether the effects of mitigating measures, such as medications and assistive devices, should be considered in determining whether someone has a disability. Despite agency guidance and the Supreme Court decisions, however, courts continue to struggle with the concept of "disability" under the ADA.

The Legal Background

To be protected by the ADA, an individual must show that he or she (1) has an impairment that substantially limits a major life activity ("an actual disability"); (2) has a record of having a substantially limiting impairment ("a record of a disability"); or (3) is regarded as having such an impairment ("regarded as having a [disability]").[17]

Under the actual disability prong, an ADA complainant must show that he or she (1) has an "impairment"; (2) the impairment limits a "major life activity"; and (3) the limitation caused by the impairment is substantial.[18] Impairments include the following conditions:

1. Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
2. Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[19]

Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[20] One who is "substantially limited" in a major life activity is either unable to perform the function or "[s]ignificantly restricted as to the condition, manner or duration" for which the person can perform the activity.[21]

Under the "record of" prong, an individual must prove there was discrimination because he or she had a history of or was misclassified as having an impairment substantially limiting a major life activity.[22] This prong is intended to ensure that there is no discrimination because a person may have a history of disability. It also is intended to cover a situation in which a person may have been misclassified as having a disability and suffers discrimination because someone acts on this misclassification.[23]

To prove that one is entitled to ADA protection under the "regarded as" prong, the individual must show that an employer has made "an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity."[24] The individual need not actually have a substantially limiting impairment. The act protects individuals from being discriminated against because of the false belief that they have such impairments.[25]

In determining whether a person has "a physical or mental impairment that substantially limits one or more major life activities,"[26] courts had to address the issue of whether this assessment should take into account any "mitigating measures" the individual may have

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[15] Equal Employment Opportunity Commission, Compliance Manual, "Threshold Issues," <http://www.eeoc.gov/docs/threshold.html> (June 6, 2000), p. 12.

[16] The EEOC has promulgated regulations further defining the requirements of the ADA (*see* 29 C.F.R. Part 1630 (1999)) and has issued Interpretive Guidance, which is attached as an appendix to the formal regulations. The Justice Department has promulgated regulations attempting to clarify the parts of the ADA it is responsible for enforcing (*see* 28 C.F.R. Part 35 (1999)) and has also provided assistance in the form of Interpretive Guidance as an appendix to the regulations.

[17] *See* 42 U.S.C. § 12102 (1994); *Sutton*, 119 S. Ct. at 2144.

[18] Bragdon v. Abbott, 118 S. Ct. 2196, 2202 (1998).

[19] 29 C.F.R. § 1630.2(h) (1999).

[20] 29 C.F.R. § 1630.2(i).

[21] 29 C.F.R. § 1630.2(j).

[22] 29 C.F.R. § 1630.2(k).

[23] 29 C.F.R. Part 1630, app. p. 351 (1999).

[24] *Sutton*, 119 S. Ct. at 2150.

[25] *Id. See also* 29 C.F.R. § 1630.2(l) (1999).

[26] 42 U.S.C. § 12102(2)(A).

used.[27] The term "mitigating measures" has been used in the ADA context to refer to "medicines, or assistive or prosthetic devices."[28]

Because medicines or other measures may greatly alleviate the symptoms of an impairment, considering their impact could lead a court to find that a condition, which without medication would be severely limiting, is not sufficiently serious to warrant ADA protection. An example of a mitigating measure is an employee with diabetes who is able to control the condition by administering insulin injections and taking other precautions.[29] However, without medical assistance, the employee might be wholly unable to function.[30] Thus, the decision whether to evaluate the severity of the employee's condition while the employee is taking medications is critical in the ultimate determination of whether there is an impairment substantially limiting a major life activity.

Although this is crucial to determining whether a person can prove he or she is an individual with a disability, the ADA does not expressly address it. The issue of whether mitigating measures should be taken into account was discussed when Congress was considering the legislation. After the ADA was enacted, the EEOC and the Department of Justice issued guidelines directly addressing this issue.

Legislative History of Mitigating Measures

Three congressional committee reports contain guidance on the issue of mitigating measures. The House Education and Labor Committee report states:

> Whether a person has a disability should be assessed without regard to the availability of mitigating measures such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.[31]

Similarly, the House Judiciary report states that impairments "should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation."[32] The Senate Labor and Human Resources Committee report contains similar language: "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."[33] The Senate report also states:

> [An] important goal of the third prong of the [disability] definition, [the "regarded as" prong,] is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation.[34]

These two sections of the Senate report create some confusion. The Senate report first states that mitigating measures should not be taken into account in determining whether a person has a disability, but later the report appears to state that if a person's impairment is controlled by mitigating measures, he or she is protected under the "regarded as" language of the law but does not have an "actual impairment."[35] While some may believe this confusion is evidence that Congress never clearly answered the question of if, or how, mitigating measures should be treated, others believe this clearly demonstrates Congress' intent to cover individuals with controlled conditions under either the "actual" or

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[27] *See* Wit, "Should 'Mitigating Measures' Be Considered," p. 74.

[28] 29 C.F.R. Part 1630, app. (1999), pp. 345, 349–50.

[29] *See* Arnold v. United Parcel Servs., Inc., 136 F.3d 854, 856 (1st Cir. 1998).

[30] *Id.*

[31] H.R. Rep. No. 101-485, pt. II, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334.

[32] H.R. Rep. No. 101-485, pt. III, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451.

[33] S. Rep. No. 101-116, at 23 (1989).

[34] S. Rep. No. 101-116, at 24 (1989).

[35] Perry Meadows, M.D., and Richard Bales, "Using Mitigating Measures to Determine Disability Under the Americans With Disabilities Act," *South Dakota Law Review*, vol. 45 (2000), pp. 33, 40.

the "regarded as" prongs of the definition of disability.[36]

Agencies' Guidance on Mitigating Measures

The ADA delegated authority primarily to three agencies to enforce specific provisions of the act. The EEOC has authority to issue regulations to implement ADA's employment provisions,[37] the Attorney General of the United States has the authority with respect to the public service provisions,[38] and the Secretary of Transportation has the power pertaining to the ADA's transportation provisions.[39] Further, these agencies are mandated to offer technical assistance to help implement the provisions they are responsible for enforcing.[40]

Although the regulations promulgated by the Equal Employment Opportunity Commission address the definition of "substantially limits," the regulations do not address the role mitigating measures should play in that determination.[41] The EEOC did address mitigating measures in the interpretive guidance that is an appendix to the regulations.[42] Citing the congressional committee reports, the guidance states that "the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[43]

The Department of Justice in its interpretive guidance states, "The question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modifications, auxiliary aids and services."[44] The Department of Transportation had adopted this same definition.[45]

Eight out of the nine United States Courts of Appeals that considered the issue recognized the legislative intent and agreed with the three enforcement agencies' interpretation that the effects of mitigating measures should not be considered.[46] One court of appeals did not.[47] It is against this backdrop that the Supreme Court addressed the issue.

THE SUPREME COURT'S VIEW OF THE ADA MITIGATING MEASURES

Sutton v. United Airlines, Inc.

In *Sutton*, the complainants are twin sisters who have severe myopia—worse than 20/200 vision in one eye and worse than 20/400 vision in the other eye.[48] Thus, without eyeglasses or contact lenses, they cannot see to engage in many activities.[49] While wearing eyeglasses, they can " 'function identically to individuals without a similar impairment.' "[50] The sisters applied to United Airlines for positions as commercial airline pilots.[51] They were told that they did not meet the airline's "minimum vision requirement, which was uncorrected visual acuity of 20/100 or better."[52] Because of their failure to meet the requirement, their job interviews were terminated and they were not offered positions as pilots.[53]

Justice O'Connor wrote the opinion for the 7–2 majority. Addressing the contention that all

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[36] *Sutton*, 119 S. Ct. at 2154–55 (1999) (Stevens, J., dissenting).

[37] 42 U.S.C. § 12116.

[38] 42 U.S.C. § 12134.

[39] 42 U.S.C. § 12164.

[40] 42 U.S.C. § 12206(c)(1).

[41] 29 C.F.R. § 1630.2(j) (1999).

[42] 29 C.F.R. Part 1630, app., pp. 349–50.

[43] Ibid., p. 350. On June 8, 2000, the EEOC issued a final rule that rescinded those parts of the Interpretive Guidance (§ 1630.2(h), (j)), which had stated mitigating measures should not be considered in determining whether an individual has a disability. Interpretive Guidance on Title I of the Americans with Disabilities Act, 65 Fed. Reg. 36327 (2000) (to be codified at 29 C.F.R. Part 1630, Appendix).

[44] 28 C.F.R. Part 35, app. A § 35.104 (1999).

[45] 49 C.F.R. Part 37.3 (1998). This provision was changed after the Supreme Court decisions on the definition of disability. *Compare* 49 C.F.R. Part 37.3 (1999).

[46] Arnold v. United Parcel Servs., Inc., 136 F.3d 854 (1st Cir. 1998); Bartlett v. New York State Bd. of Law Exam'rs, 156 F.3d 321 (2d Cir. 1998); Matczak v. Frankfork Candy & Chocolate Co., 136 F.3d 933 (3d Cir. 1997); Washington v. HCA Health Servs. of Texas, 152 F.3d 464 (5th Cir. 1998); Baert v. Euclid Beverage, Ltd., 149 F.3d 626 (8th Cir. 1998); Doane v. Omaha, 115 F.3d 624 (8th Cir. 1997); Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996); and Harris v. H&W Contracting Co., 102 F.3d 516 (11th Cir. 1996).

[47] Sutton v. United Airlines, Inc., 130 F.3d 893 (10th Cir. 1997).

[48] *Sutton*, 119 S. Ct. at 2143.

[49] *Id.*

[50] *Id.* (citation omitted).

[51] *Id.*

[52] *Id.*

[53] *Id.*

the federal agencies charged with enforcing the ADA had taken the position that the effects of mitigating measures should not be considered, the Supreme Court acknowledged that under the ADA the EEOC, the Attorney General, and the Secretary of Transportation were given authority to issue regulations under the act.[54] The Court went on, however, to observe that no agency had been given the explicit authority "to issue regulations implementing the generally applicable provisions of the ADA which fall outside of Titles I–V. Most notably, no agency has been delegated authority to interpret the term 'disability.' "[55] The Court then held that the agency guidelines at issue here (those discussing mitigating measures) were an "impermissible interpretation of the ADA."[56]

The Court refused to decide what deference should be given to the other agency regulations purporting to define disability. Likewise, the Court did not decide what persuasive force the agencies' interpretive guidance on what constitutes a disability should be accorded by the courts.[57] As for any legislative intent mandating a different conclusion, the Court merely stated, "[B]ecause the ADA cannot be read [to ignore the effects of mitigating measures], we have no reason to consider the ADA's legislative history."[58]

The Court gave several reasons for its conclusion. Preliminarily, the Court found that the language of the statute was clear, and therefore, it was unnecessary to consider the legislative history of the act.[59] The Court then referenced three provisions of the ADA that it found evidenced an intent to consider the effect of conditions in a mitigated state. First, the act requires that "a person be *presently*—not potentially or hypothetically—substantially limited."[60] The Court arrived at that conclusion because the statutory language, "substantially limits," is in the present indicative verb form.[61] Thus, the effect that the condition could or would have without mitigating measures is not relevant.[62] The Court reasoned that the relevant inquiry is the *current* effect of the condition, even if the person is using mitigating measures.[63]

Second, the Court noted, that under the ADA, "whether a person has a disability . . . is an individualized inquiry."[64] However, judging an individual's impairment in its unmitigated state "runs directly counter to" this mandated individualized inquiry.[65] The Court stated that judging impairments in an unmitigated state would often require courts "to speculate about a person's condition . . . and . . . force them to make a disability determination based on general information about how an uncorrected impairment usually affects people in general, rather than on the individual's actual condition."[66] The Court found that such an approach, which would require treating individuals as members of groups, was "contrary to both the letter and the spirit of the ADA."[67]

Finally, the Court observed that Congress stated in the statute that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older."[68] The Court concluded that the number 43 million was "inconsistent with the definition of disability" advocated by the employees in the *Sutton* case—that they should be viewed in an unmitigated state.[69] The Court cited a law review article, written by Robert Burgdorf, who was a primary contributor to the original ADA bill introduced to Congress in 1988, which noted the distinction between two definitions of disability—the "heath conditions" versus "working conditions" approaches.[70] According to the health conditions approach, the term disability includes any condition that "impair[s] the health or normal functional abilities of an individual."[71] This definition

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[54] *Id.* at 2144–45.

[55] *Id.* (citations omitted).

[56] *Id.* at 2146.

[57] *Id.* at 2145–46.

[58] *Id.*

[59] *Id.*

[60] *Id.* (emphasis added).

[61] *Id.*

[62] *Id.*

[63] *Id.* at 2147 (emphasis added).

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* (quoting 42 U.S.C. § 12101(a)(1) internal quotation marks omitted).

[69] *Id.*

[70] *Id.* (citation omitted).

[71] *Id.* at 2148 (citation omitted).

includes individuals who wear eyeglasses, because they would have a condition that affects their health or normal functional activities. Based on the health conditions definition of disability, in 1986 there were more than 160 million individuals with disabilities.[72] By contrast, the working conditions approach focuses on an individual's ability to work.[73] According to this definition of disability, 22.7 million people are individuals with disabilities.[74] The Court concluded that the 43 million figure was "closer to the work disabilities approach than the health conditions approach."[75] The Court stated that "the 43 million figure reflects an understanding that those whose impairments are largely corrected by medication or other devices are not 'disabled' within the meaning of the ADA."[76] By using the 43 million figure, rather than the 160 million figure, the Court reasoned that Congress could not have intended to cover all conditions but only intended to cover those that were not corrected through the use of mitigating measures.

The Supreme Court held that "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment, including, in this instance, eyeglasses and contact lenses."[77] The Court explained:

> Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is "substantially limited" in a major life activity and thus "disabled" under the Act.[78]

Murphy v. United Parcel Service, Inc.

On the same day it handed down *Sutton*, the Supreme Court, in an opinion written by Justice O'Connor for a 7–2 majority, also affirmed the dismissal of another case where the employee failed to show he was entitled to protection under the ADA.[79] Vaughn Murphy was first diagnosed with high blood pressure when he was a child. His blood pressure, when unmedicated, is 250/160 and imposes substantial restrictions on his life.[80] When he is on medication his "hypertension does not significantly restrict his activities and . . . in general he can function normally and can engage in activities that other persons normally do."[81] He was hired by United Parcel Service to drive a commercial motor vehicle, which required a Department of Transportation (DOT) certification that he was physically qualified to do so and that he had "no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial vehicle safely."[82] At the time he was hired, despite the fact that his blood pressure was so high that he did not qualify for a DOT certification, he was erroneously granted one by the medical examiner. After UPS discovered the error, Murphy was re-evaluated. The examination indicated that his blood pressure was too high for DOT certification and he was fired.[83]

Murphy argued in his ADA lawsuit that his unmedicated condition was an actual impairment "substantially limiting" a major life activity or was "regarded as" such a condition.[84] Relying on its analysis in *Sutton*, the Supreme Court affirmed the lower court's decision that "when medicated, [Murphy's] high blood pressure does not substantially limit him in any major life activity."[85] Relying on *Sutton*, the Court rejected Murphy's argument that he was "regarded as" being substantially limited in a major life activity. The Court explained that a "person is 'regarded as' disabled within the meaning of the ADA if the covered [employer] mistakenly believes that the person's actual, nonlimiting impairment substantially limits one or more major life activities."[86] The Court continued that Murphy "is, at most, regarded as unable to perform only a particular job. This is insufficient as a

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[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.* at 2143.

[78] *Id.* at 2146.

[79] Murphy v. United Parcel Servs., Inc., 119 S. Ct. 2133 (1999).

[80] *Id.* at 2136. *See also id.* at 2139 (Stevens, J., dissenting).

[81] *Id.* at 2136.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 2137.

[85] *Id.*

[86] *Id.*

matter of law, to prove that [Murphy] is regarded as substantially limited in the major life activity of working."[87]

Albertsons, Inc. v. Kirkingburg

On the same day it decided *Sutton* and *Murphy*, the Supreme Court also decided whether Hallie Kirkingburg, whose vision was described by the Court as "amblyopia, an uncorrectable condition that leaves him with 20/200 vision in his left eye and monocular vision in effect," was entitled to protection under the ADA.[88] Kirkingburg was erroneously certified by a doctor as meeting DOT's basic vision standards.[89] After returning from a leave of absence his vision was correctly assessed and he was fired because he could not meet DOT's basic vision standards. The DOT had a provision that allowed the vision requirement to be waived in certain circumstances. Kirkingburg received a DOT waiver after he was fired, but his employer, Albertsons, still refused to hire him.[90]

After finding that Kirkingburg's amblyopia was a physical impairment, the Court turned to the question of whether it substantially limited his ability to see.[91] Referring to the EEOC regulations,[92] the Court first reiterated that the law requires the limitation to be substantial or in the words of the EEOC regulations, the impairment must "significantly restrict" the major life activity, not merely require that the activity be done in a "different" manner. The Court explained, "While the Act 'addresses substantial limitations on major life activities, not utter inabilities,' it concerns itself only with limitations that are in fact substantial."[93]

The Court next addressed Kirkingburg's ability to compensate for and adapt to his vision impairment. Here the Court recognized "that Kirkingburg's 'brain has developed subconscious mechanisms for coping with [his] visual impairment and thus his body compensated for his disability.' "[94] Again relying on *Sutton*, Justice Souter explained that the Court saw "no principled basis for distinguishing between measures undertaken with artificial aids, like medicine and devices, and measures undertaken, whether consciously or not, with the body's own systems."[95] In other words, Kirkingburg's ability to adapt and compensate for his impairment had to be taken into consideration in determining whether his vision impairment substantially limits his ability to see. The Court emphasized that this had to be done on a case-by-case basis, and that those claiming protection under the ADA must "prove a disability by offering evidence that the extent of the limitation in terms of their own experience . . . is substantial."[96] While the DOT standard involved here could be waived, the Supreme Court went on to explain that an employer does not have to justify or defend its reliance on a federal safety standard that contains an experimental waiver provision like the one relied on by Albertsons.[97] The Supreme Court then reversed the lower appeals-court decision, which affirmed the trial court decision dismissing Hallie Kirkingburg's discrimination claim.[98]

Essential Functions of the Position: Judicial Estoppel

One who has succeeded in proving that he or she is an individual with a disability must next prove that he or she is "qualified" for the position and able "with or without reasonable accommodation . . . [to] perform the essential functions of [the] . . . position."[99] This determination is not made in a vacuum but in many cases is affected by statements an employee may have made in

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[87] *Id.* at 2139 (citation omitted).

[88] Albertsons, Inc. v. Kirkingburg, 119 S. Ct. 2162, 2165–66 (1999).

[89] *Id.* at 2165–66.

[90] *Id.* at 2166.

[91] *Id.* at 2167–68.

[92] *Id.* at 2168. The Court emphasized it was referring to the EEOC regulations because no party had questioned their validity. The Court explained that it was doing so "without deciding that such regulations are valid" or deciding "what level of deference, if any, they are due." *Id.* at 2167, n. 10 (citation omitted). The Court made similar observations in *Sutton*, 119 S. Ct. at 2145–46; and *Murphy*, 119 S. Ct. at 2138.

[93] *Albertsons*, 119 S. Ct. at 2168.

[94] *Id.* (citation omitted).

[95] *Id.* at 2169.

[96] *Id.*

[97] *Id.* at 2170–72.

[98] *Kirkingburg*, 119 S. Ct. at 2165–67, 2174.

[99] 29 C.F.R. § 1630.2(m) (1999). The EEOC regulations clarify that "[t]he term 'essential functions' does not include the marginal functions of the position." 29 C.F.R. § 1630.2(n) (1999).

attempting to secure other disability-related benefits. The interplay between statements made by employees seeking these benefits and the person's rights under the ADA often creates issues of judicial estoppel.[100]

Judicial estoppel arguments usually arise when employees seeking ADA protection have also applied for some type of disability benefit. In applying for Social Security, workers' compensation, or other similar benefits, applicants usually must certify that they are "totally disabled" and unable to engage in any employment.[101] Using the doctrine of judicial estoppel, employers have argued, often successfully, that employees who have made such declarations should be barred from later asserting in ADA litigation that they are able to perform the essential functions of the position.[102]

Cases in which courts have addressed this issue have involved a variety of factual scenarios. For example, in *McNemar v. Disney Store*, an HIV positive employee was fired because he allegedly removed $2 from a store's cash supply and used the money for personal purposes with no intention of returning it.[103] Shortly before the employee was terminated, the employer questioned the employee about a rumor that the employee had tested positive for HIV.[104]

The employee brought suit under the ADA, alleging that he was fired because of his HIV status in violation of the ADA.[105] After the employee lost his job, he applied for state disability benefits and Social Security Disability Insurance benefits.[106] In the SSDI benefits applications, the employee asserted that he was "unable to work."[107]

Relying upon this statement, the trial court ruled that the plaintiff, McNemar, could not prove he was a "qualified individual with a disability" under the ADA because he had claimed that he was unable to work in his application for SSDI.[108] Faced with similar factual scenarios highlighting the apparent inconsistency between asserting that one is "unable to work" for Social Security purposes and that one can perform the essential functions of the position under the ADA, other courts have precluded plaintiffs from proceeding with their ADA claims.[109]

Other cases have reached an opposite conclusion and have not automatically precluded employees from attempting to make a claim under the ADA, while at the same time applying for disability benefits. In *Griffith v. Wal-Mart Stores, Inc.*,[110] an employee began working in a retail store after disclosing in the employment application that he had previously suffered a back injury.[111] Although the employer accommodated his physical restrictions, the employee, Griffith, subsequently re-injured his back.[112] After a leave of absence, the plaintiff returned to work, subject to physical limitations.[113] Shortly thereafter, the employer fired the employee for allegedly "failing to report to work and lack of dependability."[114] The employee filed a charge with the EEOC alleging he was fired because of his back injury, which violated the ADA.[115]

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[100] The term "judicial estoppel" has been described as follows: "a party is bound by his judicial declarations and may not contradict them in a subsequent proceeding involving [the] same issues and parties. . . . [A] party who by his pleadings, statements or contentions, under oath, has assumed a particular position in a judicial proceeding [may not] . . . assume an inconsistent position in a subsequent action." BLACK'S LAW DICTIONARY 848 (6th ed. 1990). This concept and the concepts of *res judicata*, collateral estoppel, and the Rooker-Feldman doctrine have a "close affinity" to one another and for the purposes of this discussion will be discussed collectively under judicial estoppel. Sheehan v. City of Glouchester, 207 F.3d 35, n. 5 (1st Cir. 2000) (citation omitted).

[101] *See* 42 U.S.C. § 423(d)(2)(A) (1994) (stating that an applicant for Social Security disability benefits must show "that he is not only unable to do his previous work but cannot . . . engage in any other kind of substantial gainful work which exists in the national economy. . . .").

[102] *See, e.g.*, McNemar v. Disney Store, Inc., 91 F.3d 610, 619 (3d Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997) (upholding trial court's conclusion that McNemar failed to prove the requisite elements of an ADA claim because he was judicially estopped from arguing that he could perform the essential functions of the position).

[103] *Id.* at 614.

[104] *Id.* at 613.

[105] *Id.* at 616.

[106] *Id.* at 615–16.

[107] *Id.* (quoting the employee's Social Security Disability Insurance application).

[108] *Id.* at 617–19.

[109] *Id.* at 619.

[110] 135 F.3d 376 (6th Cir. 1998).

[111] *Id.* at 378.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

After he was fired, the employee applied for Social Security Disability Insurance benefits and stated in the application that he was "unable to work because of [his] disabling condition. . . ."[116] The Sixth Circuit Court of Appeals recognized the differences behind the ADA and the Social Security Act, and that under the Social Security Act, there is no need to consider the concept of reasonable accommodation.[117] As opposed to how the *McNemar* court had ruled, the Sixth Circuit ruled that the trial court had erred when it barred Griffith from pursuing his ADA claim based upon the statements he had made in his Social Security disability application.[118]

This issue was the subject of substantial testimony at the Commission's ADA hearing. Employee rights advocates claim that rigidly applying the doctrine of judicial estoppel places "an aggrieved person unemployed with a disability in what the courts have called the untenable choice of having to choose between the relatively immediate disability benefits that are needed for financial subsistence . . . or to wait and gamble on an ADA lawsuit,"[119] and, as a practical matter, "the ADA is going to go unenforced."[120] Employer representatives, on the other hand, claim that the employee should not be permitted to make statements under oath in one forum and have them ignored in another.[121] For employers, in the ADA context, these "[s]worn statements in other forums represent one of the few ways to evaluate the truthfulness of that claim and separate the legitimate claims from the illegitimate claims."[122]

To place this controversy in context, the differences between being "disabled" for the purpose of Social Security coverage and being a "qualified individual with a disability" under the ADA must be examined. Under Social Security laws,[123] an individual is considered "disabled" if he cannot "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."[124] To satisfy the eligibility requirement, an individual must have a "physical or mental impairment or impairments . . . of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . ."[125]

The Social Security application process proceeds in five steps.[126] In the first step, the Social Security Administration (SSA) determines whether the applicant is currently engaged in any " 'substantial gainful activity.' "[127] If not, the inquiry continues to the next step, which is a determination of whether the applicant's condition (or combination of conditions) is "severe"; i.e., significantly limits the individual's physical or mental ability to do basic work activities. If the condition(s) is not severe, the application is denied. If it is considered severe, the SSA proceeds to the third step, at which it determines whether the condition (or combination of conditions) is included in the SSA's "Listing of Impairments" or is equivalent in severity to one of SSA's listings.[128] If the condition(s) is included, the SSA concludes that the applicant is disabled.[129] If the condition(s) does not meet or equal the severity of a listing, the inquiry proceeds to the fourth step. Here the SSA determines whether the condition prevents the appli-

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[116] *Id.*

[117] *Id.* at 380–83.

[118] *Id.* at 384.

[119] Maureen C. Weston Testimony, Hearing Transcript, p. 221. Maureen C. Weston is an associate professor of law at the University of Oklahoma, where she teaches courses in disability law. Ibid., pp. 215, 220.

[120] Weston Testimony, Hearing Transcript, p. 235.

[121] Dana S. Connell Testimony, Hearing Transcript, p. 219.

[122] Ibid.

[123] Claims have been barred based on applications for workers' compensation benefits under state laws, private employer disability applications, and applications for other forms of assistance. Social Security is the focus here because it is applied uniformly throughout the United States.

[124] 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A) (1994 & Supp. II 1996).

[125] 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B) (1994 & Supp. II 1996).

[126] 20 C.F.R. § 44.152, 416.920 (1999).

[127] *Griffith*, 135 F.3d at 393 (quoting 20 C.F.R. § 404.1520(b) (1999)).

[128] *Id.*

[129] *Id.*

cant from performing his or her "past relevant work."[130]

If the applicant is able to perform his or her past relevant work, the claim is denied.[131] If not, the inquiry proceeds to the fifth and final step, in which the SSA decides whether, considering the applicant's remaining functional capacity, age, education, and work experience, the applicant can perform other work that "exists in the national economy"; i.e., exists in significant numbers either in the region where the individual lives or in several regions of the country.[132] The Social Security Act specifies that this inquiry is without regard to whether such work exists in the immediate area in which the applicant lives, whether a specific job vacancy exists for the applicant, or whether the applicant would be hired if he or she applied for work.[133] If the individual cannot perform other work, SSA concludes that he or she is disabled.[134] If the individual can, the application is denied.[135]

On February 12, 1997, the EEOC issued an Enforcement Guidance setting forth the agency's position "that representations made in connection with an application for disability benefits should not be an automatic bar to an ADA claim."[136] The EEOC set forth two main distinctions between the ADA and Social Security laws. First, the ADA always requires an individualized evaluation of the individual's condition and the employment position at issue. On the other hand, Social Security laws rely on generalized inquiries.[137] Second, the ADA's definition of disability requires courts to consider the possibility of a reasonable accommodation.[138] By contrast, Social Security laws do not weigh the impact a reasonable accommodation could have on an individual's employability. Based on these distinctions between the statutory schemes, the EEOC asserts that representations made on Social Security applications should not automatically bar a plaintiff from seeking relief under the ADA.[139] Rather, the representations should be given some evidentiary value, depending on the timing of the statements and the context in which they were made.[140] The EEOC concludes with two policy arguments in support of its position. First, it asserts that allowing complainants to pursue their claims is important in order to achieve the ADA's goals. Second, the EEOC argues that individuals should not be forced to choose between Social Security benefits and ADA protections.[141]

Cleveland v. Policy Management Systems Corp.

In a rare unanimous decision, the Supreme Court resolved the debate when it held that "pursuit, and receipt, of [Social Security Disability Insurance] benefits does not automatically estop the recipient from pursuing an ADA claim."[142] Carolyn Cleveland had a stroke while employed by Policy Management Systems.[143] She initially applied for SSDI benefits. But when her condition improved she returned to work, and her application for disability benefits was denied on that basis.[144] She was fired and requested the Social Security Administration to reconsider her application for benefits, asserting that "[she] was unable to work due to [her] disability."[145] Upon her firing, she had also filed a claim under the

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[130] *Id.* (quoting 20 C.F.R. § 404.1520(e) (1999)).

[131] *Id.*

[132] *Id.* (quoting 20 C.F.R. § 404.1560(c) (1999)).

[133] *See* 42 U.S.C. §§ 423(d)(2), 1382c(3)(B) (1998 Supp.).

[134] *Griffith*, 135 F.3d at 395.

[135] *Id.*

[136] Equal Employment Opportunity Commission, "EEOC Enforcement Guidance on Disability Representations," *Daily Labor Report* (BNA), Feb. 14, 1997, p. E-1 (hereafter cited as EEOC Enforcement Guidance on Disability Representations). This is also available at Equal Employment Opportunity Commission, "EEOC Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person Is a 'Qualified Individual with a Disability' Under the Americans with Disabilities Act of 1990," Feb. 12, 1997, <http://www.eeoc.gov/docs/qidreps.txt.com> (June 22, 2000). The EEOC's recently issued "Threshold Issues" contains an entire section on this issue titled "Preclusion Based on a Prior State of Federal Court Decision." This provides EEOC investigators detailed instructions on how to attempt to deal with preclusion issues when they are raised in an investigation. EEOC Compliance Manual, "Threshold Issues," <http://eeoc.gov/docs/threshold.html> (June 6, 2000).

[137] EEOC Enforcement Guidance on Disability Representations § I.C.1.

[138] 42 U.S.C. § 12111(8) (1994).

[139] EEOC Enforcement Guidance on Disability Representations § II.A.

[140] Ibid.

[141] Ibid.

[142] Cleveland v. Policy Mgmt. Sys., Corp., 119 S. Ct. 1597, 1600 (1999).

[143] *Id.*

[144] *Id.*

[145] *Id.*

ADA arguing that her employer had failed to reasonably accommodate her disability. The lower court dismissed her ADA claim based on the fact that in the SSDI proceeding she had alleged she was totally disabled. Now in her ADA petition she claimed she could perform the essential functions of her job. The lower court believed these two claims conflicted with each other.[146]

The Supreme Court rejected the employer's arguments and vacated the lower court's dismissal of her claim—giving Ms. Cleveland her day in court.[147] The Court did caution that employees cannot simply ignore statements they made in pursuit of SSDI benefits but must be able to explain why any "SSDI contention is consistent with [their] ADA claim," that they can perform the essential job functions with or without reasonable accommodations.[148]

Interaction with Collective Bargaining Agreements

Wright v. Universal Maritime Service Corp.

Within days of the conclusion of the Commission's ADA hearing,[149] the Supreme Court also analyzed the issue of whether a general arbitration clause in a union agreement required a union member to utilize the collective bargaining agreement's arbitration procedures even though the union member was alleging a violation of the ADA.[150] Ceasar Wright, a longshoreman and a member of the AFL-CIO, returned to work following settlement of a work-related injury claim for permanent disability.[151] After he returned, Mr. Wright was referred by the union hiring hall to several jobs, none of which complained about his performance.[152] When one of the companies learned that he had previously settled a claim for permanent disability, the company refused to accept him for further employment.[153]

Mr. Wright ultimately filed suit in the United States District Court for the District of South Carolina alleging violations of the ADA. The trial court dismissed his claim because he had not used the grievance procedure provided for by the collective bargaining agreement. The appeals court affirmed this decision, finding that the general arbitration provision in the collective bargaining agreement was broad enough to encompass claims arising under the ADA.[154]

The Supreme Court disagreed, vacated the order dismissing Mr. Wright's claim, and sent the matter back to the trial court for further proceedings. In doing so, the Court held that "the collective-bargaining agreement in this case does not contain a clear and unmistakable waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination."[155]

In reaching this decision the Court recognized that there is tension between the line of cases holding that there can be no prospective waiver of an employee's federal right to work in an environment free of discrimination under Title VII of the Civil Rights Act of 1964,[156] and a second line of cases which have held that some federal claims of discrimination can be subject to compulsory arbitration.[157] The Court in *Wright* avoided resolving this tension, finding the collective bargaining agreement did not contain a waiver of the employees' right to pursue their ADA claims.[158]

The Supreme Court Addresses ADA Issues beyond Employment

Olmstead v. L.C.

The Supreme Court did not limit its ADA decisions to those involving employment. At the Commission's ADA hearing there was substantial testimony regarding the ADA's requirement that government services be provided in the

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[146] *Id.*

[147] *Id.* at 1604.

[148] *Id.* at 1600.

[149] While this issue was not the subject of testimony at the Commission's ADA hearing, to ensure a complete discussion of all Supreme Court decisions rendered after the hearing, it is briefly discussed.

[150] Wright v. Universal Maritime Serv. Corp., 119 S. Ct. 391 (1998).

[151] *Wright*, 119 S. Ct. at 393.

[152] *Id.*

[153] *Id.*

[154] *Id.* at 394.

[155] *Id.* at 397.

[156] Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

[157] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[158] *Wright*, 119 S. Ct. at 395–97.

most integrated setting appropriate to the needs of the individual with a disability, and whether this requirement mandates placing individuals with disabilities in community rather than institutional settings.[159] The Supreme Court addressed this issue directly in *Olmstead v. L.C.*[160]

In *Olmstead*, the state of Georgia's own health care professionals determined that two women who are mentally retarded and were confined to a state hospital by the state would be appropriately treated in a community setting, a determination neither woman opposed. Despite these recommendations, the women remained institutionalized.[161] One woman filed suit under Title II of the ADA, arguing that the "most integrated setting" requirement of the ADA mandated her placement in a community setting as opposed to an institution.[162] The Court answered with a "qualified yes."[163] The Court explained:

> States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.[164]

The Court's decision was an attempt to balance competing interests. The Court explicitly held that "[u]njustified isolation . . . is properly regarded as discrimination . . ."—in this instance the institutionalization of individuals with mental disabilities.[165] The Court went on to recognize that states need to maintain a full range of options available for the treatment of individuals with mental disabilities. In light of this obligation, the Court pointed out that in determining whether community placement was required the states must consider "not only the cost of providing community-based care to the [persons requesting or desiring community placement], but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably."[166]

Garrett v. University of Alabama

One issue that the United States Supreme Court had before it last term but which it did not reach was whether the provisions of the ADA that permit an individual to sue a state entity are constitutional.[167] The Court on October 11, 2000, heard oral arguments on this issue and a decision is expected in the spring.[168] The precise ADA issue the Court is considering is "[w]hether the Eleventh Amendment to the United States Constitution bars suits by private citizens against non-consenting states."[169]

The Court's agreement to consider this issue comes on the heels of another decision, *Kimel v. Florida Board of Regents*,[170] where the Court found that similar provisions in the Age Discrimination in Employment Act did not override the state's 11th Amendment immunity.[171] Already the lower courts are split on this issue. Following *Kimel*, several courts have already held that Congress exceeded its authority by allowing private individuals under the ADA to sue state entities in federal court.[172] Others have

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[159] Ira Burnim, A. Kathryn Powers, Joseph Rogers, and Dr. E. Fuller Torrey Testimony, Hearing Transcript, pp. 116–94. Mr. Burnim is the legal director of the Judge David Bazelon Center for Mental Health. Ms. Power is director of the Rhode Island Department of Mental Health, Retardation, and Hospitals. Joseph Rogers is executive director of the Mental Health Association of Southeastern Pennsylvania. Dr. Torrey is president of the Board of Treatment and executive director of the Stanley Foundation for Research on Schizophrenia and Bi-Polar Disorders. Ibid., pp. 116–17.

[160] Olmstead v. L.C., 119 S. Ct. 2176 (1999). This case and its practical effect will be discussed in greater detail in chapter 5—Psychiatric Disabilities and the ADA.

[161] *Olmstead*, 119 S. Ct. at 2183.

[162] *Id.* at 2183–84.

[163] *Id.* at 2181.

[164] *Id.* at 2190.

[165] *Id.* at 2185.

[166] *Id.*

[167] The Court had agreed to review this issue in Florida Dep't of Corrections v. Dickson, 120 S. Ct. 976 (2000) and Alsbrook v. Arkansas, 120 S. Ct. 1003 (2000), which raised 11th Amendment immunity under both Titles I and II of the ADA. The Court dismissed those petitions after the parties settled. *Dickson*, 120 S. Ct. at 1236; *Alsbrook*, 120 S. Ct. 1265 (2000).

[168] Garrett v. Univ. of Alabama, 193 F.3d 1214 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1669 (2000) No. 99-1240 (Oct. 11, 2000).

[169] *Id.*

[170] 120 S. Ct. 631 (2000).

[171] Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000).

[172] Stevens v. Illinois Dep't of Transportation, No. 98-3550, 2000 U.S. App. LEXIS 6496 (7th Cir. Apr. 11, 2000); Erickson v. Northeastern Illinois Univ., 207 F.3d 945 (7th Cir. 2000). In *Erickson*, the court emphasized that the 11th

observed that there are significant differences between the legislative underpinnings of the ADA and the Age Discrimination in Employment Act, and have used that difference to uphold private citizens' right to sue states in the federal courts for violations of the ADA.[173]

Effects of the Supreme Court's Actions

The Supreme Court answered directly several of the issues debated at the Commission's ADA hearing.[174] These answers may have raised as many questions as they resolved. One major concern that was expressed by employer representatives was that because of the vagueness of the terms of the ADA there was going to continue to be "very expensive, long, drawn-out litigation."[175] "[T]he experience of many employers . . . is as the recipient of a charge of discrimination or worse yet, of an ADA lawsuit. The ADA is a statute over which everything is litigated."[176] The employer representatives maintain that the answers to these questions come through litigation "to great expense by employers."[177] The Supreme Court decisions may have ensured that the answers to these ADA questions will continue to come at great expense through litigation, absent congressional action.

Continued Litigation over Who Is Entitled to Protection under the ADA

The Supreme Court's decisions in *Murphy*, *Sutton*, and *Albertsons*, while answering the precise question of whether mitigating measures should be considered in determining whether an impairment substantially limits a major life activity, will probably increase rather than decrease litigation on these issues. The Court has changed the target of the litigation. The Court in *Sutton* explained that the effects of any mitigating measure "both positive and *negative*—must be taken into account. . . ."[178] The litigation pre-*Sutton* focused on limitations caused by the impairment. Now the focus will be on limitations caused by mitigating measures.[179] For example, if an impairment is treated by medication, the limitation caused by that medication must be considered. Indeed, in *Sutton* the Court acknowledged that the negative side effects resulting from the use of mitigating measures might be severe.[180] In cases where the impairment in its mitigated state may not be a substantial limitation on a major life activity, the effects of the mitigating measures will still have to be examined. Employees who seek to prove they are entitled to ADA protection now must provide substantial evidence demonstrating the effect of the mitigating measure; meanwhile, employers will counter with expert testimony, attempting to show that these effects are hypothetical and not substantial.

Following these Supreme Court cases, the EEOC issued guidance to its field offices to assist the EEOC investigators in determining whether a person has a "disability" under the ADA and whether the person is "qualified."[181] The EEOC's guidance is extremely detailed and demonstrates just how fact intensive these

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Amendment only bars private litigation against states in federal courts and that "[t]he ADA is valid legislation, which both private and public actors must follow." *Id.* The court wanted to make it clear that the federal government could still enforce the ADA against state entities and that private individuals could still bring their ADA claims against consenting state courts. *See also* Neinast v. Texas Dep't of Transportation, No. 99-50811, 2000 U.S. App. LEXIS 14577 (5th Cir. June 26, 2000).

[173] Kilcullen v. New York State Dep't of Labor, 205 F.3d 77 (2d Cir. 2000). *See also* Becker v. Oregon Dep't of Corrections, No. 99-35296, 2000 U.S. App. LEXIS 12847 (9th Cir. June 8, 2000).

[174] For example one entire panel was devoted to "Judicial Trends in Defining Qualified Individuals With a Disability: Mitigating Measures and Judicial Estoppel." Dana Connell, Maureen Weston, Lisa Hogan, and James Frierson Testimony, Hearing Transcript, pp. 214–67. *See* discussion on *Sutton*, *Murphy*, and *Albertsons* earlier in this chapter.

[175] Roger Clegg Testimony, Hearing Transcript, p. 90. Mr. Clegg is the vice president and general counsel of the Center for Equal Opportunity, a nonprofit research and educational organization. Ibid., p. 26.

[176] Christopher G. Bell Testimony, Hearing Transcript, p. 159. Mr. Bell is a managing partner in the law firm of Jackson, Lewis, Schnitzler & Krupman. Ibid., pp. 155–56.

[177] Bell Testimony, Hearing Transcript, p. 160. *See also* Ann E. Reesman Testimony, Hearing Transcript, pp. 178–79.

[178] *Sutton*, 119 S. Ct. at 2146 (emphasis added).

[179] Perry Meadows, M.D., and Richard Bales, "Using Mitigating Measures to Determine Disability Under the Americans with Disabilities Act," *South Dakota Law Review*, vol. 45 (2000), p. 33; Lauren J. McGarity, "Disabling Corrections and Correctable Disabilities: Why Side Effects Might be the Saving Grace of Sutton," *Yale Law Journal*, vol. 109 (2000), p. 1161.

[180] *Sutton*, 119 S. Ct. at 2147.

[181] Equal Employment Opportunity Commission, "Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing 'Disability' and 'Qualified,' " <http://www.eeoc.gov/docs/field-ada.html> (Apr. 26, 2000).

threshold determinations have become.[182] On May 12, 2000, the EEOC also issued a new Compliance Manual section on threshold issues, which contains additional guidance on how to make the threshold determination of whether a person is an individual with a disability under the ADA.[183]

In addition to continuing costly litigation, others argue that the Supreme Court decisions in *Sutton*, *Murphy*, and *Albertsons* "will drastically reduce the scope of ADA's protection."[184] It is argued that these decisions "ignore the intent of Congress, and have hard ramifications for individuals with treatable disabilities because they will still be subject to discrimination but will not have the protection of the ADA."[185] These decisions fueled the "widespread perception that the Supreme Court rendered the ADA powerless in the workplace."[186] This does not appear to be a hypothetical concern. The lower courts, relying on *Sutton*, have as a rule curtailed the applicability of the ADA where the employee has used mitigating measures.[187] Many of these cases involve impairments that pre-*Sutton* were believed to be exactly the types of conditions that Congress intended the ADA to cover,[188] including conditions like epilepsy,[189] cancer,[190] and multiple sclerosis.[191]

EEOC and Justice Department Regulations at Risk?

In the ADA cases reviewed by the Supreme Court the parties did not question the validity or deference due the regulations and guidelines defining disability that have been promulgated by the EEOC and the Department of Justice (DOJ).[192] Despite this fact, the Court pointed out that it was not ruling on either the validity of, or deference due, these regulations.[193] In *Sutton*, the Court explained:

> No agency, however, has been given the authority to issue regulations implementing the generally applicable provisions of the ADA. Most notably, no agency has been delegated authority to interpret the term "disability." Justice Breyer's contrary, imaginative interpretation of the Act's delegation provisions is belied by the terms and structure of the ADA.[194]

As to the Interpretive Guidance that has been issued by the EEOC and the DOJ, the Court also concluded there was no need to determine what deference, if any, this guidance should be given by the courts.[195]

Because the Supreme Court raised this issue, employers will challenge the regulations and interpretative guidance that have been issued by the EEOC and the DOJ. While the regulations and guidance represent a reasoned and logical effort by the DOJ and the EEOC to help guide entities through the issues surrounding ADA enforcement, their validity will be continually suspect and attacked by businesses until the Supreme Court or Congress addresses the matter.

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[182] Ibid.

[183] Equal Employment Opportunity Commission, Compliance Manual, "Threshold Issues," <http://eeoc.gov/docs/threshold.html> (June 6, 2000), pp. 12–13.

[184] Barbara M. Smith-Duer, "Too Disabled or Not Disabled Enough: Between a Rock and a Hard Place After *Murphy v. United Parcel Service, Inc.*," *Washburn Law Journal*, vol. 39 (2000), p. 255.

[185] Ibid.

[186] McGarity, "Disabling Corrections and Correctable Disabilities," p. 1162 (citation omitted).

[187] Ibid., p. 1173, n. 74 (listing a compilation of recent cases rejecting claims of individuals using corrective measures).

[188] H.R. Rep. No. 101-485, pt. II, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334. S. Rep. No. 101-116, at 24.

[189] Arnold v. City of Appleton, 97 F. Supp. 2d 937, 947 (S.D. Wis. 2000) (finding "There is no dispute that the plaintiff has epilepsy. . . . The plaintiff has not shown that he is 'disabled' as contemplated by the ADA"). *See also id.* Todd v. Acad. Corp., 57 F. Supp 2d 448, 452–54 (S.D. Tex. 1999) (finding that the employee's epilepsy was an impairment for ADA purposes but as medicated did not substantially limit a major activity).

[190] EEOC v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999). In *Gallagher*, while finding that the employees condition "if left untreated, would affect the full panorama of life activities, and indeed would likely result in an untimely death," the court held that the "predicted effects of the impairment in its untreated state" could not be considered an actual disability under the Supreme Court's recent decisions. *Id.* at 653. The court did find that the jury should determine whether the employee was regarded as disabled under the ADA. *Id.* at 657.

[191] Sorensen v. Univ. of Utah Hosp., 194 F.3d 1084, 1086–89 (10th Cir. 1999) (holding that an employee with multiple sclerosis was not an individual with a disability under any prong of the ADA's definition of disability).

[192] *Sutton* at 2145; *Albertsons* at 2167, n. 10.

[193] *Sutton* at 2145; *Murphy* at 2138; *Albertsons* at 2167, n. 10; *Olmstead* at 2183.

[194] *Sutton*, 119 S. Ct. at 2145 (citation omitted).

[195] *Id.* at 2146.

Between a Rock and a Hard Place

In *Cleveland*, the Court recognized that both the ADA and the Social Security Act seek to "help individuals" but do it in different ways.[196] The Court likewise recognized the different purposes of the two laws.[197] While the Court acknowledged there was a difference between these two laws, the Court also recognized that statements made by an applicant for SSDI benefits were relevant in determining whether the individual could also pursue an ADA claim. The Court held that "pursuit, and receipt, of SSDI benefits does not automatically estop the recipient from pursuing an ADA claim."[198]

The Court went on to point out that "an ADA Plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim."[199] Rather, the ADA plaintiff must be able to provide an explanation of the SSDI statement sufficient for a juror to conclude that the person could have done the essential job functions at issue in the ADA action with or without reasonable accommodation.[200] Employers will most likely require this explanation in every case. In many of the cases since *Cleveland*, the employees have been unable to offer this required explanation.[201]

Even before the *Cleveland* decision, employers were attempting to lock employees into statements made on disability benefits forms, in an attempt to ensure estoppel on ADA claims.[202] For example, some employers were considering having disability benefits forms that use the exact language of the ADA.[203] These efforts will probably result in more ADA claims being dismissed as some courts have rigidly applied judicial estoppel when the disability benefits application language has tracked the ADA.[204]

In ADA litigation, costs associated with explaining the meaning of statements made on disability applications will continue to be incurred by both parties. The focus of the parties also will be diverted from the issue of whether the employee can perform the essential functions of the job in question with or without reasonable accommodation.

Since the Commission's ADA hearing, the Supreme Court had an opportunity to amplify the ADA's vision of "a bright new era of equality" for "every man, woman and child."[205] The Court gave no bright line rules resolving the issues before it or ensuring the ADA's vision. Given these Supreme Court decisions and absent congressional action, the result of these decisions may continue to be "[t]oo much money going to [ ] attorneys rather than towards addressing pressing concerns . . . of those who face serious challenges because of their disabilities."[206]

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[196] *Cleveland*, 119 S. Ct. at 1601.

[197] *Id.*

[198] *Id.* at 1600.

[199] *Id.*

[200] *Id.* at 1604.

[201] *See* Mitchell v. Washingtonville Central Sch. Dist., 190 F.3d 1 (2d Cir. 1999) (holding that an employee alleging on a Social Security application that he is unable to stand cannot proceed with an ADA claim because he cannot do the essential functions of the job); Motley v. New Jersey State Police, 196 F.3d 160 (3d Cir. 1999) (holding that an employee's claims for disability insurance could not be reconciled with his claims under the ADA); Feldman v. American Memorial Life Ins. Co., 196 F.3d 783 (7th Cir. 1999) (holding that an employee's claims for Social Security disability precluded her from claiming she could do the essential job functions); and Lloyd v. Hardin County, 207 F.3d 1080 (8th Cir. 2000) (holding that an employee could not explain away the representations made on an application for Social Security benefits).

[202] Connell Testimony, Hearing Transcript, p. 245.

[203] Ibid.

[204] Pena v. Houston Lighting & Power Co., 154 F.3d 267, 269 (5th Cir. 1998).

[205] President Bush's Signing Statement, book 2, p. 1079.

[206] Lisa Hogan Testimony, Hearing Transcript, p. 225.

CHAPTER 4

Substance Abuse under the ADA

It has been reported that 10 percent to 25 percent of the American population is "sometimes on the job under the influence of alcohol or some illicit drug."[1] The social and economic costs of substance abuse in America are staggering. In a report issued in 1998 by the National Institute on Alcohol Abuse and Alcoholism and the National Institute on Drug Abuse, it is estimated that the cost of alcohol and drug abuse for 1995 was $276.4 billion, of which $166.5 billion was for alcohol abuse and $109.8 billion was for drug abuse.[2]

Title I of the Americans with Disabilities Act[3] specifically permits employers to ensure that the workplace is free from the illegal use of drugs and the use of alcohol, and to comply with other federal laws and regulations regarding drug and alcohol use. At the same time, the ADA provides limited protection from discrimination for recovering drug abusers and for alcoholics.[4]

The following is an overview of the current legal obligations for employers and employees:

- An individual who is currently engaging in the illegal use of drugs is not an "individual with a disability" when the employer acts on the basis of such use.
- An employer may not discriminate against a person who has a *history* of drug addiction but who is not currently using drugs and who has been rehabilitated.
- An employer may prohibit the illegal use of drugs and the use of alcohol at the workplace.
- It is not a violation of the ADA for an employer to give tests for the illegal use of drugs.
- An employer may discharge or deny employment to persons who currently engage in the illegal use of drugs.
- Employees who use drugs or alcohol may be required to meet the same standards of performance and conduct that are set for other employees.
- Employees may be required to follow the Drug-Free Workplace Act of 1988 and rules set by federal agencies pertaining to drug and alcohol use in the workplace.[5]

[1] *See* Federico E. Garcia, "The Determinants of Substance Abuse in the Workplace," *Social Science Journal*, vol. 33 (1996), pp. 55, 56. *See also* National Institute on Alcohol Abuse and Alcoholism, U.S. Department of Health and Human Services, *Sixth Special Report to the U.S. Congress on Alcohol and Health*, no. 22 (1987).

[2] The main components of the estimated costs of alcohol abuse include health care expenditures (12.3 percent); productivity losses due to premature death (21.2 percent); productivity impairment due to alcohol-related illness (45.7 percent); and property and administrative costs of alcohol-related motor vehicle crashes (9.2 percent). The main components of the estimated costs of drug abuse include health care expenditures (10.2 percent); lost productivity of incarcerated perpetrators of drug-related crimes (18.3 percent); lost legitimate production due to drug-related crime careers (19.7 percent); other costs of drug-related crime, including police, legal, and corrections services, federal drug traffic control, and property damage (18.4 percent); and impaired productivity due to drug-related illness (14.5 percent). National Institute on Alcohol Abuse and Alcoholism (NIAAA) and the National Institute on Drug Abuse (NIDA), *The Economic Costs of Alcohol and Drug Abuse in the United States*, May 13, 1998.

[3] 42 U.S.C. §§ 12111–12117 (1994).

[4] 42 U.S.C. §§ 12111–12117.

[5] Equal Employment Opportunity Commission, Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act § 8.2, January 1992 (hereafter cited as EEOC Technical Assistance Manual on the ADA).

When Are Drug Users Covered under the ADA?

The ADA provides that any employee or job applicant who is "currently engaging" in the illegal use of drugs is not a "qualified individual with a disability."[6] Therefore, an employee who illegally uses drugs—whether the employee is a casual user or an addict—is not protected by the ADA if the employer acts on the basis of the illegal drug use.[7] As a result, an employer does not violate the ADA by uniformly enforcing its rules prohibiting employees from illegally using drugs.[8] However, "qualified individuals" under the ADA include those individuals:

- who have been successfully rehabilitated and who are no longer engaged in the illegal use of drugs;[9]
- who are currently participating in a rehabilitation program and are no longer engaging in the illegal use of drugs;[10] and
- who are regarded, erroneously, as illegally using drugs.[11]

A former drug *addict* may be protected under the ADA because the addiction may be considered a substantially limiting impairment.[12] However, according to the EEOC Technical Assistance Manual on the ADA, a former *casual* drug user is not protected:

> [A] person who casually used drugs illegally in the past, but did not become addicted is not an individual with a disability based on the past drug use. In order for a person to be "substantially limited" because of drug use, s/he must be addicted to the drug.[13]

What Is a "Current" Drug User?

The definition of "current" is critical because the ADA only excludes someone from protection when that person is a "current" user of illegal drugs. In her testimony before the Commission, Nancy Delogu, counsel to the Institute for a Drug-Free Workplace,[14] stated, "There is insuffi-

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[6] 42 U.S.C. § 12114(a) (1994); 29 C.F.R. § 1630.3(a) (1999). *See, e.g.*, Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274 (4th Cir. 1997) (current illegal drug user is not covered). Ellen Weber, director of the national office of the Legal Action Center, a law and policy office that specializes in alcohol, drug, and AIDS issues, said in her testimony before the Commission that prior to passage of the ADA, individuals with current drug problems were protected under the Rehabilitation Act against discrimination to the extent they could perform their jobs. "[The] decision to eliminate coverage," Ms. Weber testified, "was based on nothing other than the pure political decision that nobody wanted to appear soft on drugs. . . ." Ellen Weber, testimony before the U.S. Commission on Civil Rights, hearing, Washington, D.C., Nov. 12–13, 1998, transcript, p. 25 (hereafter cited as Hearing Transcript). Ms. Weber argued that this change in the law "did nothing more than . . . deter some individuals from getting into treatment and driving the problem underground in an effort to hide that problem from an employer." Ibid., pp. 25–26.

[7] Under the ADA, "illegal use" is broader than just the use of drugs that are commonly viewed as illegal. It includes the use of illegal drugs that are controlled substances (e.g., cocaine) as well as the illegal use of prescription drugs that are controlled substances (e.g., Valium). For example, in Nielsen v. Moroni Feed Co., 162 F.3d 604, 611, n. 12 (10th Cir. 1998), the court stated there "is no doubt that, under the ADA, illegal drug use includes the illegal misuse of pain-killing drugs which are controlled by prescription as well as illegal street drugs like cocaine."

[8] EEOC Technical Assistance Manual on the ADA § 8.3. *See, e.g.*, Wood v. Indianapolis Power & Light, 2000 U.S. App. LEXIS 1769 (7th Cir. 2000), No. 99-1652 (meter reader who tested positive for cocaine and marijuana use was not protected by the ADA).

[9] 42 U.S.C. § 12114(b) (1994).

[10] 42 U.S.C. § 12114(b) (1994). A "rehabilitation program" may include inpatient, outpatient, or employee assistance programs, or recognized self-help programs such as Narcotics Anonymous. EEOC Technical Assistance Manual on the ADA § 8.5.

[11] 42 U.S.C. § 12114(b). *See* Ackridge v. Dep't of Human Servs., City of Philadelphia, 3 AD Cases (BNA) 575, 576 (E.D. Pa. 1994), in which the plaintiff claimed that she was discriminated against because she was incorrectly regarded as an alcoholic and/or a substance abuser. In dicta, the court noted that if the plaintiff was in fact regarded as a drug abuser (and if she was not using drugs), or if she was regarded as an alcoholic, she might have a valid ADA claim. *Id.* at 576. *See also* EEOC Technical Assistance Manual on the ADA, which states that "tests for illegal use of drugs also may reveal the presence of lawfully-used drugs. If a person is excluded from a job because the employer erroneously 'regarded' him/her to be an addict currently using drugs illegally when a drug test revealed the presence of a lawfully prescribed drug, the employer would be liable under the ADA." Ibid. at § 8.9.

[12] *See* EEOC Technical Assistance Manual on the ADA § 8.5. *See also* Hartman v. City of Petaluma, 841 F. Supp. 946, 949 (N.D. Cal. 1994) (there must be "some indicia of dependence" to be considered substantially limiting a major life activity).

[13] EEOC Technical Assistance Manual on the ADA § 8.5.

[14] The Institute for a Drug-Free Workplace, a nonprofit corporation, was established in 1989 as an independent private sector coalition. Its membership includes major employers and employer organizations, including leading American companies in petrochemical, manufacturing, high technology, construction, pharmaceutical, hospitality, retail, and transportation industries. The institute is active on legislative, legal, and regulatory issues at the federal, state, and

cient law on the issue right now and it is causing great difficulty for employers to determine exactly when they may take discipline against an employee."[15]

Mark Rothstein, professor of law and director of the Health, Law and Policy Institute at the University of Houston, concurred with Ms. Delogu, testifying before the Commission that the EEOC should "engage in some sort of interpretive statement" and, after consulting with experts in the rehabilitation community,

> could offer guidance that would be very helpful to employers in this area such as stating a particular length of time that an individual must be stable and making progress or require certification of an individual who had a substance abuse problem from some professional that they were making good progress before they would be covered [by the ADA], because . . . employers are having a difficult time making a determination. The courts have been reluctant to set out specific time periods, and this is an area that has caused a great deal of concern.[16]

The EEOC has defined "current" to mean that the illegal drug use occurred "recently enough" to justify the employer's reasonable belief that drug use is an ongoing problem.[17] The EEOC Technical Assistance Manual on the ADA provides the following guidance:

- If an individual tests positive on a drug test, he or she will be considered a current drug user, so long as the test is accurate.
- Current drug use is the illegal use of drugs that has occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an ongoing problem.
- "Current" is not limited to the day of use, or recent weeks or days, but is determined on a case-by-case basis.[18]

The Circuit Courts of Appeals have held that a person can still be considered a current user even if he or she has not used drugs for a number of weeks or even months. For example, in *Zenor v. El Paso Healthcare Systems, Ltd.*,[19] the court held that the employee, a pharmacist, was a "current" user because he had used cocaine five weeks prior to his notification that he was going to be discharged. In *Salley v. Circuit City Stores, Inc.*,[20] the court noted that it knew of "no case in which a three-week period of abstinence has been considered long enough to take an employee out of the status of 'current' user."[21]

In *Shafer v. Preston Memorial Hospital Corp.*,[22] the court considered the ADA claim of a nurse who was stealing medication to which she had become addicted.[23] While the hospital investigated the matter, the nurse was put in drug rehabilitation.[24] The day after she finished her inpatient drug rehabilitation, she was notified that she had been terminated for "gross misconduct involving the diversion of controlled substances."[25]

In concluding that the plaintiff was still a "current" illegal drug user, the court noted that "the ordinary or natural meaning of the phrase 'currently using drugs' does not require that a drug user have a heroin syringe in his arm or a marijuana bong to his mouth at the exact moment contemplated."[26] Rather, according to the court, someone is a "current" user if he or she illegally used drugs "in a periodic fashion during the weeks and months prior to discharge."[27]

Can Enrolling in a Rehabilitation Program Provide ADA Protection?

A question sometimes arises as to whether a drug addicted employee who breaks the company rules can, before being disciplined, enroll in a supervised drug rehabilitation program, and then claim ADA protection as a former drug addict who no longer illegally uses drugs. In her

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local levels. *See 1999–2000 Guide to State and Federal Drug-Testing Laws*, by Mark A. de Bernardo and Nancy N. Delogu, published by the Institute for a Drug-Free Workplace, Washington, D.C.

[15] Nancy Delogu Testimony, Hearing Transcript, p. 12.

[16] Mark Rothstein Testimony, Hearing Transcript, p. 17.

[17] *See* 29 C.F.R. § 1630.3, app. at 357 (1999).

[18] EEOC Technical Assistance Manual on the ADA § 8.3.

[19] 176 F.3d 847, 867 (5th Cir. 1999).

[20] 160 F.3d 977 (3d Cir. 1998).

[21] *Id.* at 980.

[22] 107 F.3d 274 (4th Cir. 1997).

[23] *Id.* at 275.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 278.

[27] *Id.*

testimony before the Commission, Nancy Delogu stated:

> It is causing great difficulty for employers to determine exactly when they may take discipline against an employee who may have had a disciplinary problem, tests positive or admits to a substance abuse problem, comes into rehabilitation for maybe 30 days. The employer waits until the employee returns to the work force and then says, "All right, now we're going to talk about the problems we have," and the employee says, "Hey, I'm disabled, I'm now covered by the ADA. . . ." This provision actually serves as something of a disincentive to employers to offer rehabilitation and other services to employees before addressing any substantive performance problems.[28]

The EEOC Technical Assistance Manual on the ADA states that such claims made by an applicant or employee will not be successful:

> An applicant or employee who tests positive for an illegal drug cannot immediately enter a drug rehabilitation program and seek to avoid the possibility of discipline or termination by claiming s/he is now in rehabilitation and is no longer using drugs illegally. A person who tests positive for illegal use of drugs is not entitled to the protection that may be available to former users who have been or are in rehabilitation.[29]

Notwithstanding the EEOC's clear language, employees still attempt to use the argument in courts. When they do, the employer will argue—and usually with success—that the employee is a "current" user despite his or her recent admission into a drug rehabilitation program.[30]

For example, in *Collings v. Longview Fibre Co.*,[31] the employer fired several employees for using illegal drugs at the facility.[32] In their ADA lawsuit, seven of the eight plaintiffs said they had either completed drug rehabilitation programs or were in the process of rehabilitation at the time they were fired, so they were not "current" users.[33] Some of the plaintiffs even took drug tests shortly after they were discharged to prove they were not currently using illegal drugs.[34]

The court said "current" use was not limited to the use of drugs "on the day of, or within a matter of days or weeks before" the employment action in question.[35] Rather, said the court, the provision is intended to apply "to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct."[36] The plaintiffs were held to be "current" users and, despite the fact that they had entered or had completed a drug rehabilitation program, were not protected by the ADA.[37]

Reasonable Accommodation for Drug Addicts

The duty to provide reasonable accommodations to qualified individuals with disabilities is considered one of the most important statutory requirements of the ADA.[38] If a recovering drug addict is not currently illegally using drugs, then he or she may be entitled to reasonable accommodation. This would generally involve a modified work schedule so the employee could attend Narcotics Anonymous meetings or a leave of absence so the employee could seek treatment.[39]

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[28] Delogu Testimony, Hearing Transcript, p. 12.

[29] EEOC Technical Assistance Manual on the ADA § 8.3.

[30] *See* Cong. Rep. 336, 101st Cong. 2d Sess. (1990).

[31] 63 F.3d 828 (9th Cir. 1995), *cert. denied*, 516 U.S. 1048 (1996).

[32] *Id.* at 830.

[33] *Id.* at 833.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] Similarly, in McDaniel v. Mississippi Baptist Med. Ctr., 877 F. Supp. 321 (S.D. Miss. 1994), *aff'd*, 74 F.3d 1238 (5th Cir. 1995), the plaintiff had illegally used drugs and entered a drug treatment center prior to his termination. The court held that even though the plaintiff had entered treatment, he still was not protected by the ADA because he had not been drug free for a "considerable length" of time. In this case, the plaintiff said that he had not used drugs for only a few weeks.

[38] Employers do not have to provide an accommodation that causes an "undue hardship," meaning significant difficulty or expense. The analysis used to determine undue hardship focuses on the particular employer's resources, and on whether the accommodation is unduly extensive, substantial, or disruptive, or would fundamentally alter the nature or operation of the business. 42 U.S.C. § 12111(10) (1994); 29 C.F.R. § 1630.2(p) (1999). Another defense to an allegation of discrimination is "direct threat," meaning a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation. *See* 42 U.S.C. § 12111(3); 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2).

[39] *See* 42 U.S.C. § 12111(9) (1994); 29 C.F.R. § 1630.2(o)(2) (1999).

When Are Alcohol Users Covered under the ADA?

Individuals who abuse alcohol may be considered disabled under the ADA if the person is an alcoholic or a recovering alcoholic.[40] Courts have usually held that alcoholism is a covered disability. For example, in *Williams v. Widnall*,[41] the court flatly stated, without discussion, that alcoholism "is a covered disability."[42]

Some courts have questioned whether alcoholism should automatically be designated as a covered disability. For example, in *Burch v. Coca-Cola*,[43] the court held that alcoholism is not a per se disability and found that the plaintiff's alcoholism was not a covered disability because it did not substantially limit any of his major life activities.[44] Similarly, in *Wallin v. Minnesota Department of Corrections*,[45] the court suggested that it would analyze alcoholism on a case-by-case basis and noted that the plaintiff had not presented evidence "that his alcoholism impaired a major life activity."[46] Moreover, both *Burch* and *Wallin* are consistent with the United States Supreme Court's ruling in *Sutton v. United Airlines, Inc.*,[47] which stated clearly that an "individualized inquiry" will be conducted to determine whether an impairment "substantially limits" a major life activity. As the Court explained in *Sutton*:

> A "disability" exists only where an impairment "substantially limits" a major life activity, not where it "might," "could," or "would" be substantially limiting if corrective measures were not taken. Second, because subsection (A) [of 42 U.S.C. § 12102(2)] requires that disabilities be evaluated "with respect to an individual" and be determined based on whether an impairment substantially limits the individual's "major life activities," the question whether a person has a disability under the ADA is an individualized inquiry.[48]

Even though courts may determine that alcoholism is a covered disability, the law makes it clear that employers can enforce rules concerning alcohol in the workplace. The ADA provides that employers may:

- prohibit the use of alcohol in the workplace;[49]
- require that employees not be under the influence of alcohol in the workplace;[50] and
- hold an employee with alcoholism to the same employment standards to which the employer holds other employees even if the unsatisfactory performance or behavior is related to the alcoholism.[51]

The EEOC Technical Assistance Manual giving further guidance on the ADA provides that employers are free to "discipline, discharge or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct to the extent that s/he is not 'qualified.' "[52] The manual elaborates with the following example:

> If an individual who has alcoholism often is late to work, or is unable to perform the responsibilities of his/her job, an employer can take disciplinary action on the basis of the poor job performance and conduct. However, an employer may not discipline an alcoholic

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[40] *See, e.g.*, Adamczyk v. Baltimore County, No. 97-1240, 1998 U.S. App. LEXIS 1331 (4th Cir. 1998) (alcoholism is covered under the Rehabilitation Act); Mararri v. WCI Steel, Inc., 130 F.3d 1180, 1185 (6th Cir. 1997) (the ADA "treats drug addiction and alcoholism differently").

[41] 79 F.3d 1003 (10th Cir. 1996). *See also* Adamczyk v. Baltimore County, 1998 U.S. App. LEXIS 1331 (4th Cir. 1998) (alcoholism is covered under the Rehabilitation Act); Miners v. Cargill Communications, Inc., 113 F.3d 820 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 441 (1997) (where plaintiff could show she was regarded as being an alcoholic, she was "disabled within the meaning of the ADA"); Office of the Senate Sergeant-at-Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102 (Fed. Cir. 1996) ("it is well-established that alcoholism meets the definition of a disability").

[42] 79 F.3d 1003 (10th Cir. 1996).

[43] 119 F.3d 305 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 871 (1998).

[44] *Id.* at 322.

[45] 153 F.3d 681 (8th Cir. 1998).

[46] *Id.* at 686.

[47] 119 S. Ct. 2139, 527 U.S. 471 (1999).

[48] 119 S. Ct. at 2142.

[49] 42 U.S.C. § 12114. *See* Walker v. Consol. Biscuit Co., 522 U.S. 1028 (1997) (the court held that the employer could terminate an employee for violating its rule prohibiting employees from being under the influence of alcohol in the workplace).

[50] 42 U.S.C. § 12114 (1994).

[51] 42 U.S.C. § 12114 (1994).

[52] EEOC Technical Assistance Manual on the ADA § 8.4.

employee more severely than it does other employees for the same performance or conduct.[53]

For example, if an alcoholic employee and a non-alcoholic employee are caught having a beer on the loading dock, the employer cannot fire the alcoholic employee while giving the other employee only a written warning.[54] In *Flynn v. Raytheon Co.*,[55] the court dealt with this precise issue. It held that even though an employer can enforce its rules against intoxication on the job, it could not selectively enforce its rules in a way that treats alcoholics more harshly.[56] In short, whatever policies the employer enacts must be uniformly applied.[57]

Reasonable Accommodation for Alcoholics

The duty to provide reasonable accommodations to qualified individuals with disabilities is considered one of the most important statutory requirements of the ADA.[58] Reasonable accommodation for an alcoholic would generally involve a modified work schedule[59] so the employee could attend Alcoholics Anonymous meetings or a leave of absence[60] so the employee could seek treatment. In *Schmidt v. Safeway, Inc.*,[61] for example, the court held that the employer must provide a leave of absence so the employee could obtain medical treatment for alcoholism.[62]

The ADA does not require an employer to provide an alcohol rehabilitation program or to offer rehabilitation in lieu of disciplining an employee for alcohol-related misconduct or performance problems. In Senate proceedings, Senator Daniel Coats (R-IN) asked Senator Tom Harkin (D-IA), the ADA's chief sponsor, "Is the employer under a legal obligation under the act to provide rehabilitation for an employee who is using . . . alcohol?" In response, Senator Harkin stated, "No, there is no such legal obligation."[63] The Senate report echoes Senator Harkin's response that reasonable accommodation "does not affirmatively require that a covered entity must provide a rehabilitation program or an opportunity for rehabilitation . . . for any current employee who is [an] alcoholic against whom employment-related actions are taken" for performance or conduct reasons.[64]

The EEOC has held that "federal employers are no longer required to provide the reasonable accommodation of 'firm choice' under Section 501 of the Rehabilitation Act."[65] "Firm choice" generally entails a warning to employees with alcohol-related employment problems that they will be disciplined if they do not receive alcohol treatment. The EEOC's rationale is that the Rehabilitation Act was amended in 1992 to apply ADA standards, and that the ADA does not require an employer to excuse misconduct for poor performance, even if it is related to alcoholism. In EEOC's "Enforcement Guidance on Reasonable Accommodation and Undue Hardship" guidelines, the EEOC reiterated that an employer "has no obligation to provide 'firm choice' or a 'last chance agreement' as a reasonable accommodation."[66]

Moreover, an employer is generally not required to provide leave to an alcoholic employee if the treatment would appear to be futile. For example, in *Schmidt v. Safeway, Inc.*,[67] the court said an employer would not be required "to provide repeated leaves of absence (or perhaps even

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[53] Ibid.

[54] Ibid.

[55] 868 F. Supp. 383 (D. Mass. 1994); *aff'd* 94 F.3d 640 (1st Cir. 1996).

[56] *See also* Miners v. Cargill Communications, Inc., 113 F.3d 820 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 441 (1997), in which the court found that evidence of inconsistent enforcement of a policy concerning alcohol use (e.g., not enforcing the policy against management employees) was relevant in showing discrimination against an employee "regarded as" being an alcoholic.

[57] EEOC Technical Assistance Manual on the ADA § 8.7.

[58] *See* the preceding discussion under "Reasonable Accommodation for Drug Addicts" in this chapter.

[59] 42 U.S.C. § 12111(9) (1994); 29 C.F.R. § 1630.2(o)(2) (1999).

[60] 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o)(2).

[61] 864 F. Supp. 991 (D. Ore. 1994).

[62] *Id.* at 996.

[63] 135 CONG. REC. S10777 (daily ed. Sept. 7, 1989).

[64] S. REP. NO. 101-116 (1989).

[65] *See* Johnson v. Babbitt, Pet. No. 03940100, MSPB No. SF-0752-93-0613-I-1 (EEOC 3/28/96).

[66] *See* Equal Employment Opportunity Commission, "Enforcement Guidance on Reasonable Accommodation and Undue Hardship," no. 915.002 (Mar. 1, 1999). *See also* Adamczyk v. Baltimore County, 1998 U.S. App. LEXIS 1331 (4th Cir. 1998), where the employer fired a police officer for misconduct allegedly caused by alcoholism, and the employer was not required to permit the officer to seek treatment before taking adverse action.

[67] 864 F. Supp. 991 (D. Ore. 1994).

a single leave of absence) for an alcoholic employee with a poor prognosis for recovery."[68] And in *Fuller v. Frank*,[69] the court held that the employer was not required to give an alcoholic employee another leave of absence when alcohol treatment had repeatedly failed in the past.[70]

Finally, an employer generally has no duty to provide an accommodation to an employee who has not asked for an accommodation and who denies having a disability. In *Larson v. Koch Refining Co.*,[71] the court dealt with this precise issue and held that the employer had no obligation to provide accommodation to an employee with alcoholism when the employee did not ask for an accommodation, and in fact expressly denied having an alcohol problem.[72]

Blaming Misconduct on Alcoholism

Courts routinely hold that employees cannot blame misconduct on alcoholism. For example, in *Renaud v. Wyoming Department of Family Services*,[73] the court noted that even if alcoholism is assumed to be a disability, the ADA distinguishes between alcoholism and alcoholism-related misconduct.[74] The court determined that the employer could lawfully terminate the employee (a school superintendent) for coming to work drunk, even though he claimed the conduct resulted from his alcoholism.[75]

In *Labrucherie v. Regents of the University of California*,[76] the court stated it was not discriminatory to fire an employee because he was incarcerated after his third arrest for drunk driving.[77] The court noted that "a termination based on *misconduct stemming from a disability*, rather than the disability itself, is valid."[78]

Likewise, in *Maddox v. University of Tennessee*,[79] the university fired an assistant football coach after his third arrest for drunk driving.[80] During the arrest, the assistant coach was combative and would not take a Breathalyzer test.[81] The employee claimed that he was discriminated against based on his alcoholism because his drunk driving was a result of the alcoholism.[82] The court agreed with the university that the misconduct could be separated from the alcoholism and that the assistant coach was properly terminated due to the misconduct.[83]

It is clear that an employer does not, as a reasonable accommodation, have to forgive misconduct because the misconduct resulted from alcoholism. In *Flynn v. Raytheon Co.*,[84] the lower court noted that an employee who broke the company's policy prohibiting being under the influence of alcohol in the workplace cannot "belatedly avail himself of the reasonable accommodation provisions" of the ADA to escape discipline for his misconduct.[85] The First Circuit also noted that the ADA "does not require an employer to rehire a former employee who was lawfully discharged for disability-related failures to meet its legitimate job requirements."[86]

Direct Threat Posed by Substance Abuse

The defense of "direct threat" is one that is raised frequently by employers in dealing with issues of substance abuse. The ADA defines di-

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[68] *Id.* at 997.

[69] 916 F.2d 558, 562 (9th Cir. 1990).

[70] Similarly, in Evans v. Fed. Express Corp., 133 F.3d 137 (1st Cir. 1998), the court held that the employer was not required to provide a second leave of absence to an employee for substance abuse treatment. The court noted, "It is one thing to say that further treatment made medical sense, and quite another to say that the law required the company to retain [the employee] through a succession of efforts."

[71] 920 F. Supp. 1000 (D. Minn. 1995).

[72] *Id.* at 1006.

[73] 203 F.3d 723 (10th Cir. 2000).

[74] *Id.* at 730.

[75] *Id.* at 730–731.

[76] 1997 U.S. app. LEXIS 17755 (9th Cir. 1997).

[77] *Id.* at *3.

[78] *Id.* (emphasis added).

[79] 62 F.3d 843 (6th Cir. 1995).

[80] *Id.* at 845.

[81] *Id.*

[82] *Id.*

[83] Other courts, too, have held that an employer may terminate an employee because of improper conduct, even if the conduct is a direct result of alcoholism. In Williams v. Widnall, 79 F.3d 1003 (10th Cir. 1996), it was held that an employer lawfully fired an employee because of his threatening conduct, even though the conduct may have been a result of alcoholism. And in Newland v. Dalton, 81 F.3d 904 (9th Cir. 1996), it was held that an employer lawfully fired an employee because of a "drunken rampage," even if it was related to alcoholism.

[84] 868 F. Supp. 383 (D. Mass. 1994), *aff'd*, 94 F.3d 640 (1st Cir. 1996).

[85] *Id.* at 387.

[86] *Id.*

rect threat as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[87] The ADA permits employers to require, as a job qualification, that an individual not "pose a direct threat to the health or safety of other individuals in the workplace."[88] Moreover, an employer may institute such a requirement even if an employer's reliance on such a qualification might "screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability."[89]

The determination that an individual with a disability poses a direct threat shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job.[90] In determining whether an individual would pose a direct threat, the factors to be considered include:

- the duration of the risk;
- the nature and severity of the potential harm;
- the likelihood that the potential harm will occur; and
- the imminence of the potential harm.[91]

Evidence used in making the determination may include information from the individual, including the individual's experience in previous similar situations and the opinions of doctors, rehabilitation counselors, or physical therapists who have expertise in the specific disability or who have direct knowledge of the individual.[92]

Moreover, the EEOC has emphasized, in its Interpretive Guidance on Title I of the ADA, that an employer may not deny employment to an individual with a disability "merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, i.e., high probability of substantial harm; a speculative or remote risk is insufficient."[93]

EEOC v. Exxon Corporation

In *EEOC v. Exxon Corporation*,[94] the courts were forced to analyze the ADA's "direct threat"[95] defense and how it interacts with the "business necessity"[96] defense. With respect to substance abuse and the ADA, courts have generally recognized an employer's prerogative to formulate and rely upon safety-based job qualifications, even though they may screen out individuals with disabilities.

In *Exxon*, the EEOC brought suit against Exxon on behalf of several employees,[97] alleging that the company's blanket policy of prohibiting individuals who have ever been treated for drug or alcohol abuse from working in safety-sensitive

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[87] 42 U.S.C. § 12111(3) (1994).

[88] 42 U.S.C. § 12113(b) (1994). An employer is also permitted to require that an individual not pose a direct threat of harm to his or her own safety or health. *See* 29 C.F.R. § 1630.2(r), app. at 356 (1999).

[89] 42 U.S.C. § 12113(a) (1994).

[90] 29 C.F.R. § 1630.2(r) (1999). The regulations state that the assessment shall be based on a medical judgment that relies on the most "current" medical knowledge and/or on the "best available objective evidence."

[91] 29 C.F.R. § 1630.2(r) (1999).

[92] 29 C.F.R. § 1630.2(r), app. at 356 (1999).

[93] 29 C.F.R. § 1630.2(r), app. at 356 (1999). *See also* EEOC Technical Assistance Manual on the ADA § 8.7, which states: "An employer cannot prove a 'high probability' of substantial harm simply by referring to statistics indicating the likelihood that addicts or alcoholics in general have a specific probability of suffering a relapse. A showing of 'significant risk of substantial harm' must be based upon an assessment of the particular individual and his/her history of substance abuse and the specific nature of the job to be performed."

[94] 967 F. Supp. 208 (N.D. Tex. 1997); *rev'd and remanded in* 203 F.3d 871 (5th Cir. 2000).

[95] 42 U.S.C. § 12111(3) (1994). The ADA defines direct threat as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." EEOC v. Exxon, 967 F. Supp. at 210.

[96] 42 U.S.C. § 12113(a) (1994). The ADA states: "It may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this title." EEOC v. Exxon, 967 F. Supp. at 210.

[97] *Exxon*, 967 F. Supp. 209–10. The named plaintiffs were two Exxon employees who had been working as flight engineers but were demoted in 1994 to mechanics when they were asked whether they had a history of drug or alcohol abuse. Salvatore Filippone, who was in his late 40s, had been convicted of abusing a prescription drug when he was 19 years old. He went into rehabilitation, never abused drugs again, and in 1983 joined Exxon, where he was responsible for monitoring aircraft systems during flight, according to EEOC documents filed in federal court. Glenn Hale, who went into treatment for alcohol abuse in 1985, was hired by Exxon as a flight engineer in 1988. He abstained from drinking and never had a relapse, according to the EEOC court filing. *Id.*

"designated positions"[98] (approximately 10 percent of Exxon's positions) violated the ADA.[99] The EEOC argued that the company's policy was invalid on its face because it did not provide, as mandated by ADA regulations, for an "individualized assessment" of whether former drug abusers were qualified to work in any of the designated safety-sensitive positions.[100]

The company countered by claiming that the ADA does not require an individualized assessment of an employee's risk of relapse where such an assessment would be impractical or impossible.[101] The company argued that the risk of relapse for rehabilitated substance abusers is too great to permit them to work in the designated safety-sensitive positions, and that the inability to predict a relapse makes individualized assessments futile.[102]

The U.S. District Court found that the ADA permits an exception to the individualized assessment ordinarily required under the law.[103] The court relied on the ADA's emphasis on protecting employers from the risks posed by recently rehabilitated employees and on other employment discrimination statutes that permit blanket exclusions where safety is an issue and the employer has reason to believe that all of the disqualified employees would be unable to perform safely.[104]

In its appeal, the EEOC relied on its Interpretive Guidance to argue that employers must meet the direct threat defense:

> With regard to safety sensitive requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, as applied to the individual, satisfies the "direct threat" standard . . . in order to show that the requirement is job-related and consistent with a business necessity.[105]

The Fifth Circuit Court of Appeals examined the text of the ADA and held while "direct threat" focuses on the individual employee and examines the specific risk posed by the employee's disability, "business necessity" addresses whether the qualification standard can be justified as an across-the-board requirement.[106] The court determined that while Exxon's "blanket" across-the-board policy might exclude individuals with disabilities without an individualized analysis as to whether they could perform the essential functions of the position, this exclusion was appropriate if the employer could demonstrate that it is justified by business necessity.[107]

The *Exxon* case generated significant debate during the Commission's ADA hearing. Nancy Delogu, counsel to the Institute for a Drug-Free Workplace, said it was important to resolve the issue. She testified:

> Alcoholism and substance abuse are chronic conditions for which the risk of relapse cannot be well . . . predicted. And for certain very, very highly safety-

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[98] *Id.* at 210. The company defined a "designated position" as one in which failure could cause a catastrophic incident, and for which the employee plays a key and direct role with either no direct or very limited supervision. *Id.*

[99] *Id.* at 209–10. Exxon adopted its substance abuse policy after the Exxon Valdez ran aground in Alaska and dumped 11 million gallons of oil into the Prince William Sound. The company, eager to avoid another Valdez disaster, applied the policy to plant operators, drivers, and ships' mates after news reports surfaced that the captain of the Valdez, Joseph Hazelwood, had been drinking and that Exxon officials knew he had sought treatment for his drinking problem four years before the accident. Mr. Hazelwood was later cleared by a jury of intoxication charges. *See* Seahawk Seafoods, Inc. v. Alyeska Pipeline Serv. Co., 206 F.3d 900 (9th Cir. 2000); State v. Hazelwood, 946 P.2d 875 (Alaska 1997).

[100] *See* 29 C.F.R. § 1630.2(r), app. at 356 (1999), which states, "Determining whether an individual poses a significant risk of substantial harm to others must be made on a case by case basis."

[101] *Exxon*, 967 F. Supp. at 210.

[102] *Id.*

[103] *Id.* at 214.

[104] These statutes included the Rehabilitation Act, the Age Discrimination in Employment Act (ADEA), and Title VII "because these statutes are similar in purpose to the ADA and have often been relied upon in interpreting the ADA." *Id.* at 212. *See* Buchanan v. City of San Antonio, 85 F.3d 196, 200 (5th Cir. 1996); Daigle V. Liberty Life Ins. Co., 70 F.3d 394, 396 (5th Cir. 1995). The court noted that Rehabilitation Act case law "is especially persuasive given that the ADA is modeled after the Rehabilitation Act and Congress has directed that the two acts' judicial and agency standards be harmonized." 967 F. Supp. 212.

[105] *Exxon*, 203 F.3d 871, 873 (5th Cir. 2000).

[106] *Id.* at 874.

[107] *Id.* The court stated: "We have found nothing in the statutory language, legislative history or case law that persuades that the direct threat provision addresses safety-based qualification standards in cases where an employer has developed a standard applicable to all employees of a given class. We hold that an employer need not proceed under the direct threat provision of § 12113(b) in such cases but rather may defend the standard as a business necessity." *Id.* at 874.

sensitive positions, those which have no . . . direct supervision and for which a lapse in judgment could lead to a catastrophic error, employers wish to be able to exclude those employees from those positions. Whether they're required to transfer them to another position would certainly be something open to a policy debate, but currently this is quite a concern.[108]

Kenneth Collins, formerly the manager of the Employee Assistance Program at Chevron Corporation and currently vice president for Value Options, the nation's second largest provider of behavioral health care services, testified that the Chevron Corporation conducted a study on accident rates of its workers.[109] The study concluded that workers who had completed Employee Assistance Program-monitored substance abuse rehabilitation had no more on-the-job or off-the-job accidents than did the "regular" Chevron population.[110] Mr. Collins testified:

It certainly is my position based on my experience and the research done within Chevron and at other similar oil companies who have tightly structured employee assistance programs that, in fact, you can return individuals to highly safety-sensitive positions and not expose the company to increased risks of accidents or errors in judgment. But that is premised on having a rigorous follow-up program [which involves weekly follow-up testing].[111]

The *Exxon* case suggests that an employer should carefully consider the context in which medical guidelines will be used; i.e., will medical guidelines be used as a basis for formulating job qualifications for safety-based reasons, or will they be used to assess, during a medical examination, whether an individual poses a direct threat. The ruling in *Exxon* suggests that an employer's reliance on medical guidelines may be more defensible when they are used to formulate a broad-based qualification than to assess an individual case.

Some experts suggest that partly because of the publicity surrounding notorious cases like *Exxon*, companies can become too quick to designate a position as "safety sensitive." Mark Rothstein, professor of law and director of the Health, Law and Policy Institute at the University of Houston, testified before the Commission that some employers have indeed been overly inclusive in the process of determining which positions are safety sensitive:

I think some employers have an overly broad view of what a safety-sensitive position is and have . . . declared many jobs permanently unavailable to individuals who have ever had any sort of substance abuse problem, no matter how many years in the past. And I think that these policies are not substantiated by the scientific evidence and I think are directly counter to the purposes of the ADA.[112]

Mr. Rothstein testified that while he thought a blanket policy was "understandable" in the *Exxon* case, he thought it "ill-advised" to adopt a "basically irrebuttable presumption" that anyone who has ever had a substance abuse problem should be barred for his or her lifetime from engaging in an activity that the employer deems to be safety sensitive.[113] To illustrate his point, Mr. Rothstein referred to the case of *Knox County Education Association v. Knox County Board of Education*.[114]

In *Knox County*, the Sixth Circuit upheld the drug testing of school personnel, including principals, teachers, aides, secretaries, and bus drivers, on the ground that because these individuals play a unique role in the lives of children, all the positions were deemed to be safety sensitive,

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[108] Delogu Testimony, Hearing Transcript, p. 14. Ms. Delogu testified later in the hearing that employers should not "be able to exclude all former substance abusers for some very broad and undefined categories of safety-sensitive jobs. I do believe, however, . . . that there should be a mechanism for those very safety-critical positions to make this exception." Ibid., pp. 39–40.

[109] Kenneth Collins Testimony, Hearing Transcript, p. 16.

[110] Ibid.

[111] Ibid. *See also* testimony of Dr. Joseph Autry, the acting deputy administrator in the Substance Abuse and Mental Health Services Administration of the Department of Health and Human Services, who also emphasized the importance of follow-up treatment: "Increasingly research is indicating that relapse prevention following treatment and drug testing or alcohol testing are probably the most important things in keeping someone drug and alcohol free as they return to the workplace. . . . There needs to be ongoing rehabilitation, if you will, or relapse prevention, interventions, coupled with testing in order to maintain sobriety or to be drug free." Joseph Autry Testimony, Hearing Transcript, pp. 35–36.

[112] Rothstein Testimony, Hearing Transcript, p. 19.

[113] Ibid., p. 32.

[114] 158 F.3d 361 (6th Cir. 1998), *cert. denied*, 120 S. Ct. 46 (1999).

including the people who worked in the office.[115] Mr. Rothstein testified:

> It seems to me that if you broaden the concept of safety sensitive as far as that court and applied it in the workplace, now you're basically saying that anyone who ever had a minor substance abuse problem in college 25 or 30 years ago, they're now barred from who knows how many jobs. That strikes me as not being based on any good facts or any good policy.[116]

Ellen Weber, director of the national office of the Legal Action Center, a law and policy office that specializes in alcohol, drug, and AIDS issues, concurred with Mr. Rothstein. She testified before the Commission, "We . . . agree to a great extent with . . . what Mr. Rothstein has said with regard to the issues of employers overly expanding the list of safety-sensitive jobs to which people are rejected from blanketly."[117]

Pre-employment Inquiries about Drug and Alcohol Use

An employer may make certain pre-employment, pre-offer inquiries regarding use of alcohol or the illegal use of drugs.[118] An employer may ask whether an applicant drinks alcohol or whether he or she is currently using drugs illegally.[119] However, an employer may not ask whether an applicant is a drug abuser or alcoholic, or inquire whether he or she has ever been in a drug or alcohol rehabilitation program.[120] Indeed, the EEOC has provided extensive guidance of what can and cannot be asked through its Enforcement Guidance titled "Pre-employment Disability-Related Questions and Medical Examinations."[121]

After a conditional offer of employment, an employer may ask any question concerning past or present drug or alcohol use as long as it does so for all entering employees in the same job category.[122] The employer may not, however, use such information to exclude an individual with a disability, on the basis of a disability, unless it can show that the reason for exclusion is job related and consistent with business necessity, and that legitimate job criteria cannot be met with a reasonable accommodation.[123]

Drug Testing

An employer may conduct tests to detect illegal use of drugs.[124] The ADA does not prohibit, require, or encourage drug tests. Drug tests are not considered medical examinations, and an *applicant* can be required to take a drug test before a conditional offer of employment has been made.[125] An *employee* also can be required to take a drug test, whether or not such a test is job related and necessary for the business.[126]

An employer may refuse to hire an applicant or may discharge or discipline an employee based upon a test result that indicates the illegal use of drugs. The employer may take these actions even if an applicant or employee claims that he or she recently stopped illegally using drugs.[127]

Tests for illegal use of drugs also may reveal the presence of lawfully used drugs, i.e., prescription medications. If a person is excluded from a job because the employer erroneously "regarded" him or her to be a drug abuser, currently using drugs illegally, and a drug test revealed the presence of a lawfully prescribed drug, the employer would be liable under the ADA.[128] There was testimony at the Commission's ADA hearing to suggest that this problem should be examined more closely to see if it is

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[115] *Id.* at 363. *But see* Chandler v. Miller, 520 U.S. 305 (1997), in which the Supreme Court held that a Georgia policy requiring all candidates for public office to submit to drug tests violated the Fourth Amendment's requirement that a search be justified either by particularized suspicion or by "special needs" beyond crime detection.

[116] Rothstein Testimony, Hearing Transcript, p. 31. Mr. Rothstein testified later in the hearing that "drug testing, where necessary, should be limited to the smallest group of people possible, not demonstrated as a badge that the company disapproves of illicit substances." Ibid., p. 41.

[117] Ellen Weber Testimony, Hearing Transcript, p. 21.

[118] EEOC Technical Assistance Manual on the ADA § 8.8.

[119] Ibid.

[120] Ibid.

[121] "Pre-employment Disability-Related Questions and Medical Examinations" was issued by the EEOC on Oct. 10, 1995.

[122] EEOC Technical Assistance Manual on the ADA § 8.8.

[123] Ibid.

[124] Ibid. § 8.9.

[125] Ibid.

[126] Ibid.

[127] Ibid.

[128] Ibid. §§ 8.6, 8.9.

leading to costly and unnecessary litigation in the workplace. Nancy Delogu told the Commission:

> With drug abuse in the workplace and the number of individuals who are subject to drug testing, anyone who ever has a positive drug test, theoretically, can claim to be perceived as disabled by his or her employer or would-be employer. As a result, many cases have been brought, and many which are quite frivolous based on a positive drug test. The employer is going to do whatever they are going to do and then the employee says, "Well you saw me as disabled and I'm going to sue." Unfortunately, that's an issue of fact that requires usually lengthy discovery and litigation costs before that can be resolved.[129]

To avoid such potential liability, the employer would have to determine whether the individual was using a legally prescribed drug. An employer may not ask what prescription drugs an individual is taking before making a conditional job offer; however, an employer may validate a positive test result by asking about an applicant's lawful use of drugs or for other possible explanations for the positive test result. Alternatively, the EEOC Technical Assistance Manual on the ADA suggests:

> [O]ne way to avoid liability is to conduct drug tests after making an offer, even though such tests may be given at anytime under the ADA. Since applicants who test positive for illegal drugs are not covered by the ADA, an employer can withdraw an offer of employment on the basis of illegal drug use.[130]

Mark Rothstein, professor of law and director of the Health, Law and Policy Institute at the University of Houston, endorses this EEOC recommendation. He testified at the Commission's ADA hearing:

> This is a problem that can be avoided very simply by employers who defer drug testing until the post-offer stage, that is the pre-placement stage when there are no restrictions on inquiries regarding medical conditions or substances that could cause cross-reactivity. The reason that many employers don't want to . . . defer the testing until the post-offer stage is they think it's cheaper to screen out workers or potential workers on the basis of a positive drug test than it is to review their résumés and applications and references and to actually look at the individual. And that may well be true, but I think that's a rather unconvincing reason to me, at least, for subjecting individuals to this violation of their privacy that Congress otherwise said was impermissible.[131]

If the results of a drug test indicate the presence of a lawfully prescribed drug, such information must be kept confidential, in the same way as any medical record. If the results reveal information about a disability in addition to information about drug use, the disability-related information is to be treated as a confidential medical record.[132]

Other Laws and Regulations Concerning Drugs and Alcohol

The ADA does not interfere with an employer's ability to comply with other federal laws and regulations concerning the use of drugs and alcohol, including the Drug-Free Workplace Act of 1988; regulations applicable to particular types of employment, such as law enforcement positions; regulations of the Department of Transportation for airline employees, interstate motor carrier drivers, and railroad engineers; and regulations for safety-sensitive positions established by the Department of Defense and the Nuclear Regulatory Commission. Employers may continue to require that their applicants and employees comply with such federal laws and regulations.[133]

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[129] Delogu Testimony, Hearing Transcript, p. 13.

[130] EEOC Technical Assistance Manual on the ADA § 8.9.

[131] Rothstein Testimony, Hearing Transcript, pp. 18–19.

[132] EEOC Technical Assistance Manual on the ADA § 8.9. For example, if drug test results indicate that an individual is HIV positive, or that a person has epilepsy or diabetes because use of a related prescribed medicine is revealed, this information must remain confidential. Ibid.

[133] Ibid. § 8.10.

CHAPTER 5

Psychiatric Disabilities and the ADA

Mental illness has touched many of our families and many of our friends. . . . Mental illness is a problem affecting all sectors of American society. It shows up in both the rural and urban areas. It affects men and women, teenagers and the elderly, every ethnic group and people in every tax bracket.[1]

TITLE I: EMPLOYMENT OF INDIVIDUALS WITH PSYCHIATRIC DISABILITIES

Title I of the Americans with Disabilities Act prohibits a private employer with 15 or more employees from discriminating "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[2]

ADA's Title I principles prohibiting discrimination in the workplace were formulated for both physical and psychiatric disabilities; after the ADA passed, however, the statute as applied to physical disabilities received the most attention.[3] In fact, "the physically disabled have made much progress in the workplace since the passage; . . . [E]xperts say that discrimination has decreased and that employers generally are willing to provide the special accommodations needed by employees with physical impairments."[4]

This initial focus on physical disabilities provided few answers to the ADA's implications for people with psychiatric disorders, and "significantly less progress has been made by those with mental or intellectual disabilities."[5] The attention to psychiatric disabilities increased as alleged discrimination based on emotional or psychiatric impairments became the second largest source of ADA charges, after back problems, filed with the EEOC. The percentage of ADA charges filed with the EEOC for discrimination alleging emotional or psychiatric impairments, over the four-year period of 1992 to 1996, increased steadily from 8.7 percent to 15 percent.[6] In 1997, charges based on psychiatric disabilities increased to 15.5 percent, making psychiatric conditions the leading category of disability, with back conditions falling to second.[7] In 1998, charges based on psychiatric disabilities increased to 18.3 percent; in 1999, psychiatric disability charges decreased to 15.8 percent but were still the leading category of disability.[8]

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[1] The Health Insurance Reform Act of 1995, S. 1028, 104th Cong., 142 Cong. Rec. S3590 (1996) (statement of Sen. Wellstone).

[2] 42 U.S.C. § 12112(a) (1994). The ADA also applies to employment agencies, labor unions, and joint labor-management committees with 15 or more employees.

[3] Kathryn Moss, Matthew Johnsen, and Michael Ullman, "Assessing Employment Discrimination Charges Filed by Individuals with Psychiatric Disabilities Under the Americans with Disabilities Act," *Journal of Disability Policy Studies*, vol. 9, no. 1 (1998), p. 83. *See also* Robert Pear, "Employers Told to Accommodate the Mentally Ill," *New York Times*, Apr. 30, 1997, p. 1A (hereafter cited as Pear, "Employers Told").

[4] Gary Anthes, "The Invisible Workforce," *Computerworld*, May 1, 2000, p. 50.

[5] Ibid.

[6] Equal Employment Opportunity Commission, Charge Data System, Oct. 26, 1999.

[7] Ibid.

[8] Ibid.

TABLE 1

Percentage of Charges Filed under the ADA for Selected Impairments

	Impairment			
Fiscal year	Back problems	% of charges	Psychiatric disability	% of charges
1992	208	19.8	91	8.7
1993	3,201	19.8	1,496	9.8
1994	3,664	19.4	2,342	12.4
1995	3,463	17.5	2,608	13.2
1996	2,897	16.1	2,697	15.0
1997	2,703	14.9	2,798	15.5
1998	2,299	12.9	3,230	18.3
1999	2,069	12.2	2,682	15.8

SOURCE: EEOC, Charge Data System

This increase in charges reflects, in part, the prevalence of psychiatric disorders in our society. Data gathered by the National Institute of Mental Health and published in a 1994 U.S. Congress Office of Technology Assessment (OTA) report, *Psychiatric Disabilities, Employment, and the Americans With Disabilities Act*, indicate that more than one in five American adults experience some diagnosable mental disorder in a given year.[9] The data showed that approximately 9 percent of American adults have mood disorders (bipolar disorder, major depression, dysthmia), approximately 12 percent have anxiety disorders (phobic, panic, or obsessive-compulsive disorders), and approximately 1 percent have schizophrenia.[10]

The OTA report concluded that despite the prevalence of psychiatric disorders and the increase in charges, EEOC field offices were operating without direction when investigating charges of discrimination based on psychiatric disabilities. The report found that, despite EEOC's considerable technical assistance activity for the implementation of the ADA, "little discussion of psychiatric disabilities has occurred."[11] The OTA's inquiry at EEOC field offices revealed that "EEOC investigators consider themselves in need of more information on psychiatric disabilities."[12] Moreover, OTA found many EEOC field offices "lack any information on psychiatric disabilities,"[13] and "surveys of business representatives and ADA and rehabilitation experts indicate that many employers and employees have no knowledge of the ADA or its coverage of people with psychiatric disabilities."[14] The report recommended that the EEOC provide more guidance to employers, employees, and its own field offices on job discrimination charges based on psychiatric disorders.[15]

ISSUANCE OF EEOC PSYCHIATRIC GUIDANCE AND THE REACTION

In response to the OTA report and the lack of understanding by employers and employees about the ADA protections for individuals with psychiatric disabilities, the EEOC issued a publication titled "EEOC Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities," in March 1997.[16]

Consistent with the issuance of its other ADA enforcement guidance, the EEOC did not use formal notice and comment rulemaking to issue its Psychiatric Enforcement Guidance. The EEOC did not seek comments; rather, "the input [that led to the drafting of the Psychiatric Enforcement Guidance] came in various ways," according to Peggy Mastroianni, EEOC associate legal counsel, and the guidelines were distilled "from the entire spectrum of stakeholders."[17] At the Commission's ADA hearing, Ms. Mastroianni testified about the nature of the informal input:

[9] U.S. Congress, Office of Technology Assessment, *Psychiatric Disabilities, Employment and the Americans with Disabilities Act* (Washington, D.C.: Government Printing Office, 1994), pp. 51–52.

[10] Ibid.

[11] Ibid., p. 114.

[12] Ibid.

[13] Ibid., p. 14.

[14] Ibid., p. 67.

[15] Ibid., pp. 67, 98–105.

[16] Equal Employment Opportunity Commission, "EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities" no. 915.002 (Mar. 25, 1997), p. 1 (hereafter cited as EEOC Psychiatric Enforcement Guidance). The full text of the Psychiatric Enforcement Guidance is available on EEOC's Web site at <www.eeoc.gov> or from the EEOC's publication distribution center (800-669-3362).

[17] Peggy Mastroianni, testimony before the U.S. Commission on Civil Rights, hearing, Washington, D.C., Nov. 12–13, 1998, transcript, pp. 294–95 (hereafter cited as Hearing Transcript).

We have an attorney-of-the-day function that gets about 9,000 phone calls a year in the office of legal counsel. We got numerous questions from all the stakeholders in psychiatric disabilities from the beginning, and we keep track of those questions and save them for possible policy guidance. Then, also, in our public speaking we had a lot of interaction with employers and individuals with disabilities on these issues. And then most important we received letters, a huge number of letters, particularly on conduct issues, from employers, from the very beginning.[18]

The Psychiatric Enforcement Guidance was designed to "facilitate full enforcement of ADA on charges alleging employment discrimination based on psychiatric disability."[19] It was also intended to (1) respond to questions and concerns expressed by individuals with psychiatric disabilities regarding the ADA, and (2) answer questions posed by employers about how the principles of the ADA analysis apply in the context of psychiatric disabilities.[20] The EEOC "had been flooded with questions about the [ADA], mostly from employers, [and the EEOC] wanted to show that the law applies to people with psychiatric disabilities in exactly the same way it applies to people with physical disabilities."[21] Ms. Mastroianni explained that there was also "some feeling that you couldn't apply normal workplace rules to people with [mental] disabilities. We are saying that you can."[22]

The publication of the guidelines sparked a "firestorm of controversy."[23] Within days of its release employment lawyers, clinicians in the psychiatric field, and the national media were engaging in a fierce debate over the Psychiatric Enforcement Guidance.[24]

Andrew Imparato, general counsel and director of policy for the National Council on Disability,[25] testified at the Commission's ADA hearing:

The guidance itself is common sense. It applies well-established ADA principles in the context of psychiatric disabilities. . . . I think the average employer, if they read the document, just read it, they are going to understand it, they are going to know how to apply it, and they are going to come away from the document knowing a lot more about how to accommodate people with psychiatric disabilities, what a psychiatric disability is, than they would without having read the document.[26]

The reaction from employers was mixed. Large employers with access to personnel and legal specialists appeared least concerned. Mary Jane England, president of the Washington Business Group on Health, which represents 175 large corporations, including Pepsico and Hewlett-Packard, welcomed the guidelines saying that they clarified employers' obligations.[27] Ann Reesman, general counsel for the Equal Employment Advisory Council, a group of about 300 large employers, said the Psychiatric Enforcement Guidance was "helpful, because it gave us insights into the EEOC's position on things" and how to avoid running afoul of the agency.[28] The guidelines, she said, are cause for alarm only "if you read all the press and not the guidelines" themselves.[29] In fact, many of the companies Ms. Reesman serves "have been subject to almost identical disability requirements under the 1973 Rehabilitation Act."[30]

Jonathan Mook, a lawyer counseling both large and small employers in their attempts to deal with compliance under the ADA, testified at the Commission's ADA hearing that "the EEOC's guidelines represent at least a good initial step

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[18] Ibid.

[19] EEOC Psychiatric Enforcement Guidance, Introduction.

[20] Ibid.

[21] Pear, "Employers Told."

[22] Helen O'Neill, "New Federal Guidelines Put Employers in a Bind," Associated Press, May 3, 1997, *available in* NEXIS News Library, AP file.

[23] Claudia Center, "EEOC Guidance on Psychiatric Disabilities Advances ADA Awareness," vol. 6, no. 7 (July 1997) (hereafter cited as Center, Guidance on Psychiatric Disabilities Advances ADA Awareness).

[24] U.S. Commission on Civil Rights, *Helping Employers Comply with the ADA*, 1998, p. 118.

[25] At the drafting of this report, Mr. Imparato had left the National Council on Disability and is now president and CEO of the American Association of People with Disabilities. Mr. Imparato is also a former special assistant to EEOC Commissioner Paul Miller.

[26] Andrew Imparato Testimony, Hearing Transcript, pp. 213–14.

[27] Julie Kosterlitz, "Psyched Out," *National Journal*, May 24, 1997, p. 1028 (hereafter cited as Kosterlitz, "Psyched Out").

[28] Ibid.

[29] Ibid.

[30] Ibid.

in the area of trying to clarify and provide guidance to employers on what obligations are under the statute, and how the statutory term[s] should be interpreted."[31] Mr. Mook noted, however, that "based upon my conversation with employers, in dealing with this area, I think there are many aspects of that guidance that really fail to take into account the real-world problems that employers experience in dealing with individuals who have or claim to have psychiatric disabilities."[32]

James McDonald, a labor attorney whose firm represents a range of entities, including large and small employers, testified at the Commission's ADA hearing:

> Instead of bringing clarity . . . the EEOC's guidance, unfortunately, just creates more uncertainty. It creates this uncertainty, for example, by suggesting that a condition need not be included in the American Psychiatric Association's current edition of the DSM in order to be a covered mental disability under the ADA, by providing that personality disorders may be covered disabilities, and by expanding the list of major life activities, to include such things as sleeping, concentrating, and getting along with other people.[33]

Small employers shared this concern. The National Federation of Independent Business issued a statement calling the new guidelines "lengthy, confusing and dangerously vague," leaving small business "wide open to the risk and cost of frivolous litigation."[34] Susan R. Meisinger, senior vice president of the Society for Human Resource Management, which represents personnel directors at companies of all sizes, said the Psychiatric Enforcement Guidance "creates confusion for employers, especially small employers who don't have any special expertise" in ADA provisions.[35]

The Psychiatric Enforcement Guidance, however, did not depart dramatically from existing ADA case law, according to Robert L. Dunston, a partner in a Washington, D.C., firm that represents management nationwide in ADA, EEOC, employment, and labor law matters. Mr. Dunston observed that most attorneys specializing in the ADA, whether for plaintiffs or management, tend to agree that much of the Psychiatric Enforcement Guidance is consistent with ADA case law and the Rehabilitation Act. Mr. Dunston believes the strong reaction to the Psychiatric Enforcement Guidance was based on employers' realization of the breadth of the ADA and its potential implications in the workplace.[36] Employers are concerned not only about employees who abuse the system claiming stress-related disorders, but also with legitimate psychiatric claims, which are more difficult to accommodate than physical impairments because (1) the medical issues are not understood, and (2) "the likely accommodations may require changes in policies and practices, not simply a one-time structural change or purchase of an auxiliary aid."[37]

Employers are also concerned that accommodating individuals with psychiatric disabilities is more difficult and costly than accommodating those with physical disabilities. According to Laura Mancuso, a consultant who has advised hundreds of employers on compliance with the ADA, these concerns are not justified. Ms. Mancuso noted that accommodations "for workers with psychiatric disabilities are, in most cases, inexpensive or free. An employee with psychiatric problems may initially need more time from supervisors or coworkers, but research shows that the need tends to fade over time."[38]

Despite the initial controversy, the Psychiatric Enforcement Guidance is being relied on by courts and appears to be used by employers. There remains, however, difficulty in the application of the guidance.

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[31] Jonathan Mook Testimony, Hearing Transcript, p. 209.

[32] Ibid.

[33] James J. McDonald Jr. Testimony, Hearing Transcript, p. 207.

[34] Kosterlitz, "Psyched Out," p. 1028.

[35] Pear, "Employers Told."

[36] Robert L. Dunston, "EEOC Guidance on Psychiatric Disabilities Sparks Controversy," *Employment Testing—Law & Policy Reporter*, July 1997, p. 105.

[37] Ibid.

[38] Pear, "Employers Told." *See also* Ilana DeBare, "Making Accommodations," *San Francisco Chronicle*, Sept. 8, 1997, p. B1 (A study of Sears, Roebuck & Co. and the ADA, by Peter Blanck, a University of Iowa law professor, found that most mental disabilities were accommodated for about $100, compared with the average cost of $250 for cancer cases and $10,000 for orthopedic cases).

Disputed Areas of ADA's Coverage of Psychiatric Disabilities

Disability Defined

The ADA defines psychiatric disability as a "mental impairment that substantially limits one or more of the major life activities of [an] individual; a record of impairment; or being regarded as having such an impairment."[39] EEOC's regulations define "mental impairment" to include "any mental or psychological disorder, such as . . . emotional or mental illness."[40] The examples of impairments in the Psychiatric Enforcement Guidance include "major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders."[41] The Psychiatric Enforcement Guidance further provides that the current edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) "is relevant for identifying these disorders" and notes that Congress expressly excluded several specific conditions from ADA's protections.[42]

EEOC's broad definition of what may constitute an impairment—the DSM-IV lists more than 374 psychiatric disorders—alarmed some employers and employment attorneys because, they contend, it muddies employers' ability to correctly identify those individuals entitled to protections under the ADA. Labor attorney James McDonald testified that a listing in the DSM-IV should be required and is only a starting point for determining whether a condition is a mental impairment. "ADA's legislative history and at least one court decision recognize that Congress intended that only mental disorders as defined in the [DSM-IV] may qualify as 'mental impairments' potentially covered by the ADA."[43] Mr. McDonald would narrow the category of impairment because he believes that personality disorders, which are listed in the DSM-IV, should be excluded from ADA coverage. The Psychiatric Enforcement Guidance's inclusion of personality disorders as impairments, Mr. McDonald said,

> provides a plethora of new opportunities for problem employees to disguise their misconduct as disease. Although a nasty or insubordinate employee might not qualify as disabled if his bad attitude is considered in isolation, if his attitude can be linked somehow to a personality disorder, he will be considered to have an "impairment" that may qualify for ADA coverage.[44]

This is problematic, according to Mr. McDonald, because personality disorders are characterized more by aberrant behavior—that many employers would find objectionable—than by disordered thought or mood.[45]

Employers' attorney Jonathan Mook would narrow the ADA coverage for psychiatric disabilities further, testifying that there is no basis for the EEOC to expand disability beyond the DSM. In fact, he said, the definition of disability should be restricted to "Axis I Clinical Disorders—for purposes of the ADA analysis."[46]

The Psychiatric Enforcement Guidance, however, clearly limits the definition of impairment, providing that "[n]ot all conditions listed in the

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[39] 42 U.S.C. § 12102(2) (1994).

[40] 29 C.F.R. § 1630.2(h)(2) (1999).

[41] EEOC Psychiatric Enforcement Guidance, Question 1. The ADA and the regulations expressly exclude various sexual behavior disorders (including transvestism, transsexualism, pedophilia, and voyeurism), homosexuality, gender identity disorders, bisexuality, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs. *See* 42 U.S.C. § 12211(b) (1994); 29 C.F.R. § 1630.3(d) (1999).

[42] EEOC Psychiatric Enforcement Guidance, Question 1.

[43] James J. McDonald Jr. and Jonathan P. Rosman, "EEOC Guidance on Psychiatric Disabilities: Many Problems, Few Workable Solutions," *Employee Relations Law Journal*, vol. 23 (1997) pp. 5, 8 (hereafter cited as McDonald and Rosman, "EEOC Guidance") (citing Cong. Rec. S10772 (Sept. 7, 1989) (statement of Sen. Armstrong)).

[44] Ibid. The Psychiatric Enforcement Guidance states that "traits and behaviors" such as irritability, chronic lateness, poor judgment, and being under stress are not, in themselves, mental impairments, but may be linked to them. EEOC Psychiatric Enforcement Guidance, Question 2.

[45] Ibid. McDonald and Rosman identify seven personality disorders (PD) that raise significant questions as to how these disorders might be accommodated in the workplace: paranoid PD is a pattern of distrust and suspiciousness such that others' motives are interpreted as malevolent; antisocial PD is a pattern of disregard for, and violation of, the rights of others; borderline PD is a pattern of instability in personal relationships and self-image, and marked impulsivity; histrionic PD is a pattern of excessive emotionality and attention-seeking; narcissistic PD is a pattern of grandiosity, need for admiration, and lack of empathy; dependent PD is a pattern of submissive and clinging behavior related to an obsessive need to be taken care of; obsessive-compulsive PD is a pattern of preoccupation with orderliness, perfectionism, and control.

[46] Mook Testimony, Hearing Transcript, p. 247.

DSM-IV . . . are disabilities, or even impairments, for purposes of the ADA."[47] In fact, identifying the mental impairment, whether or not it is in the DSM, is just the first step in determining whether an individual meets the requirements for disability under the statute. Under the ADA, the disability must also substantially limit one or more of the major life activities of the individual.[48] Peggy Mastroianni testified:

> The point we make in the guidance is that DSM has all kinds of things in it that do not rise to the level of a disability. Therefore it may be useful, but it certainly isn't the end of the story. Not everything in DSM-IV is even an impairment.
>
> So how do you determine what is a disability? You use the analysis that you use for physical conditions, and that is, do you have an impairment? DSM may be useful.[49]

There is another justification for the EEOC's broad and inclusive standard for the definition of psychiatric impairment. Laura Mancuso, a psychiatric rehabilitation counselor, consultant, and mediator to businesses, testified:

> There is one thing that makes me nervous about proposing that the EEOC should say every mental impairment must be in the DSM or it is not to be covered. The DSM-IV is in some ways a political document. . . . As many of us know, there were times in history when homosexuality was considered a DSM diagnosis. This is the fourth edition; it will be revised in the future. . . . [We could] be in a position where the federal government and civil rights laws are dependent in some way on the deliberations of a group of psychiatrists who are responding [not only] to scientific knowledge, but also societal pressures and norms.[50]

Ms. Mancuso added, "Our knowledge or understanding of mental disorders" could change, and if the DSM were not "scheduled to be revised for another 5 or 10 years" it would not provide the protections envisioned by the ADA.[51] "The EEOC has not chosen, and Congress did not choose to have a list [with the ADA], nor did it with the Rehabilitation Act"; therefore, the regulations properly leave latitude for changes in both societal attitudes and scientific assessments of what constitutes a psychiatric disability.[52]

The analysis of determining whether there is a disability does not stop at finding that an individual has a mental impairment. After establishing mental impairment, an individual must still prove that the mental impairment substantially limits a major life activity. Once an individual is determined to have a disability—a mental impairment that substantially limits a major life activity—that person still may not be protected under the ADA because Title I protects only those who are also "qualified."[53] The EEOC's regulations provide that the determination of whether an individual is "qualified" should consist of a two-part inquiry.[54] First, the individual must satisfy the basic prerequisites for the position, such as possessing the appropriate educational background and employment experience.[55] Second, the individual must be able to "perform the essential functions of the position held or desired, with or without reasonable accommodation."[56]

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[47] EEOC Psychiatric Enforcement Guidance, Question 1. The Psychiatric Enforcement Guidance further states the "DSM-IV also includes conditions that are not mental disorders but for which people may seek treatment (for example, problems with a spouse or child). Because these conditions are not disorders, they are not impairments under the ADA." Ibid.

[48] *See* 29 C.F.R. § 1630(g)(1) (1999). *See also id.* at § 1630(j)(1). Substantially limits means "[u]nable to perform a major life activity that the average person in the general population can perform." 29 C.F.R. § 1630(j)(1) (1999). Factors to be considered in determining whether a person is substantially limited in a major life activity include "(i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact . . . resulting from the impairment." 29 C.F.R. § 1630(i) (1999). Major life activities are functions such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R.§ 1630(i) (1999).

[49] Mastroianni, Hearing Transcript, p. 266.

[50] Laura Mancuso, Hearing Transcript, pp. 222–23.

[51] Ibid., p. 223.

[52] Ibid.

[53] 42 U.S.C. § 12112(a) (1994).

[54] *See* 29 C.F.R. app. 1630.2(m) (1999).

[55] 29 C.F.R. app. 1630.2(m).

[56] 29 C.F.R. app. 1630.2(m). The issue of being qualified and protected by the ADA has other implications as well. Individuals permanently disabled by psychiatric disabilities have challenged disparate insurance coverage, alleging violation of Title I. While these individuals usually meet the burden of establishing disability, they generally do not prevail because they are not found to be "qualified." The insurance issue is covered in Title III of this chapter. Additionally, the Catch-22 of proving one is an "individual with a

Accommodating Psychiatric Disabilities

The ADA provides that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual with regard . . . to privileges of employment."[57] One way an entity violates these requirements of the ADA is by "not making reasonable accommodations" to a qualified individual with a mental disability.[58] The Psychiatric Enforcement Guidance states when "an individual decides to request accommodation, the individual or his/her representative must let the employer know that he or she needs an adjustment or change at work for a reason related to a medical condition. To request accommodation, an individual may use 'plain English' and need not mention the ADA or use the phrase 'reasonable accommodation.' "[59]

The Psychiatric Enforcement Guidance gives an example of an accommodation request, when an employee asks for time off because he is "depressed and stressed," the employee:

> has communicated a request for a change at work (time off) for a reason related to a medical condition (being "depressed and stressed" may be "plain English" for a medical condition). This statement is sufficient to put the employer on notice that the employee is requesting a reasonable accommodation. However, if the employee's need for accommodation is not obvious, the employer may ask for *reasonable* documentation concerning the employee's disability and functional limitations.[60]

Employer advocates complained the ambiguity of the phrase "depressed and stressed" places an unrealistic burden on the employer and should not be enough to trigger protections under the ADA. Jonathan Mook, a lawyer counseling employers in ADA compliance, testified that employees should be required, at minimum, to communicate to the employer that they have some type of a medical, psychiatric, or mental condition that requires an accommodation or some type of change at work. Mr. Mook testified:

> I think unless you have an employee coming to the employer saying, "I have been diagnosed with a certain type of mental disorder, and I need this type of specific change within the workplace," employers are going to be, really, at the peril of lawsuits left and right, not knowing whether they are on notice to have a legal obligation, or no legal obligation.[61]

Mr. Mook added that the system is unworkable "unless you put the obligation on an employee to come to the employer and tell that employer that the employee has been diagnosed with an identifiable mental disorder under some recognized standard."[62]

Ms. Mancuso agreed that an employee's request should not be vague. "If I am giving advice to people with disabilities who want accommodations I advise them to put their request in writing, to say clearly that they are involving the ADA, or they are stating that they have a disability, and they want a reasonable accommodation."[63] Ms. Mancuso added that requiring the employee to say, "I'm making this request due to a disability" is not a burdensome requirement to the employee "as long as it is a very simple—you are not creating lots of hurdles between the person and their rights. But I think some simple language, like you need to either use the word disability, or reference the ADA, I think that is pretty common sense."[64]

Mr. Imparato strongly disagreed and testified that "there are a lot of people that have no clue what the ADA is, what language to use."[65] Rather, the issue should be, "what did the em-

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disability" and yet a "qualified individual" is discussed in chapter 3 of this report.

[57] 42 U.S.C. § 12112(a) (1994).

[58] 42 U.S.C. § 12112(5)(a) (1994). The ADA does provide a defense for employers "if the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business." 42 U.S.C. § 12112(5)(a) (1994).

[59] EEOC Psychiatric Enforcement Guidance, Question 17. The request must state that it is related to a medical condition. The Psychiatric Enforcement Guidance provides an example of a request that does not meet the requirements: "An employee asks to take a few days off to rest after the completion of a major project. The employee does not link her need for a few days off to a medical condition. Thus, even though she has requested a change at work (time off), her statement is not sufficient to put the employer on notice that she is requesting reasonable accommodation." Ibid., Question 17, Example C.

[60] Ibid., Answer A (emphasis in original).

[61] Mook Testimony, Hearing Transcript, p. 227.

[62] Ibid.

[63] Mancuso Testimony, Hearing Transcript, p. 238.

[64] Ibid., p. 239.

[65] Imparato Testimony, Hearing Transcript, p. 239.

ployer know, and did they know enough to know that they might be in an ADA environment."[66] In his opinion, because the employer is in a better position to know what is required under the ADA, the burden to inquire about whether an accommodation is necessary should be on the employer once an individual has expressed the need for an accommodation.[67] There is nothing in the statute or case law that "would lead anybody to conclude that you need to use magic language in order to assert your rights under this statute."[68]

The courts, relying on the Psychiatric Enforcement Guidance, have held that no magic words are required and an individual may use plain English to trigger the process to determine whether there is a reasonable accommodation under the ADA.[69]

Providing an Accommodation

The EEOC's interpretive guidelines state, "Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation."[70] The EEOC regulations provide that reasonable accommodation means "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential function of that position."[71] Reasonable accommodation may include job restructuring, acquisition or modification of equipment or devices, reassignment to a vacant position, appropriate adjustment or modification of examinations, training materials or policies, or other similar accommodation.[72]

The Psychiatric Enforcement Guidance provides that accommodations "may involve changes to workplace policies, procedures, or practices."[73] The Psychiatric Enforcement Guidance specifically provides that accommodations may include giving individuals with a psychiatric disability time off from work or a modified work schedule, physical changes to the workplace or equipment, modifications to a workplace policy, adjustments to supervisory methods, providing a job coach, and job reassignment.[74]

The regulations provide: "To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the [employee] with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[75]

The Psychiatric Enforcement Guidance elaborates on the regulations, explaining "reasonable accommodations for individuals with disabilities

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[66] Ibid.

[67] Ibid.

[68] Ibid., pp. 239–40.

[69] *See* Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 313 (3d Cir. 1999) (employer does not have to invoke the magic words "reasonable accommodation" but must make clear he or she wants assistance); Hedberg v. Indiana Bell Telephone Co., 47 F.3d 928, 934 (7th Cir. 1995) ("the ADA does not require clairvoyance"); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1172 (10th Cir. 1999) (an employee does not need to use magic words to give employer notice that he or she is seeking an accommodation for a disability) (relying on EEOC's Psychiatric Enforcement Guidance) (the employer must, however, have some notice or knowledge of the disability). *But see* Miller v. National Cas. Co., 61 F.3d 627, 629 (8th Cir. 1995) (an employer is not obligated to divine the presence of a disability from the employee's extended absence from work and "before an employer must make accommodation for the physical or mental limitation of an employee, the employer must have knowledge that such a limitation exists"); Collings v. Longview Fibre Co., 63 F.3d 828, 834 (9th Cir. 1995) (even assuming the plaintiffs had a medically recognizable disability, they could not establish a case under the ADA when they failed to show that the employer was aware of the disability); Taylor v. Principal Mut. Life Ins., 93 F.3d 155, 165 (5th Cir. 1996) (holding, "Where the disability, resulting limitations, and necessary reasonable accommodations are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee . . . to specifically identify the disability and resulting limitations").

[70] 29 C.F.R. § 1630, app. § 1630.9 (1999).

[71] 29 C.F.R. § 1630.2(o)(1) (1999).

[72] 29 C.F.R. § 1630.2(o)(2)(i)–(ii). An employer may claim, as a defense, that the requested accommodation would create an "undue hardship." If an employer can demonstrate that it would create an undue hardship—defined as "significant difficulty or expense" in light of factors such as the nature and net cost of the accommodation and the overall financial resources of the entity—an accommodation may not need to be provided. *See* 29 C.F.R. § 1630.2(p)(1)–(2).

[73] 29 C.F.R. § 1630.2(o)(2)(i)–(ii).

[74] *See generally* EEOC Psychiatric Enforcement Guidance, "Selected Types of Reasonable Accommodation," Questions 23–29.

[75] 29 C.F.R. § 1630.2(o)(3) (1999).

[are] determined on a case-by-case basis because workplaces and jobs vary, as do people with disabilities."[76]

The Circuit Courts of Appeals have considered the regulations, the interpretive guidelines, and the Psychiatric Enforcement Guidance and have split in their opinions on the parties' burdens in the interactive process. The Ninth Circuit held that an employee's first request for accommodation does not trigger an employer's duty to initiate an interactive process. Instead, the court found that the regulations state only that an interactive process may be necessary. The court determined that the EEOC used permissive language, which serves as a warning to employers that a failure to engage in an interactive process might expose them to liability for failing to make reasonable accommodation. The Ninth Circuit ruled an employer will be liable for discrimination if a reasonable accommodation was available, but the employer did not act upon it; however, "the ADA and its regulations do not . . . create independent liability for the employer for failing to engage in ritualized discussions with the employee to find a reasonable accommodation."[77]

Other circuits, however, have concluded that both parties have a duty to act in good faith and assist in the search for appropriate reasonable accommodations.[78] The Third Circuit held that "[o]nce an employer knows of the disability and the employee's desire for accommodations, it makes sense to place the burden on the employer to request additional information."[79] The Eighth Circuit held:

> Although the employee at all times retains the burden of persuading the trier of fact that he or she has been the victim of illegal disability discrimination, "once the plaintiff makes a facial showing that reasonable accommodation is possible," the burden of production shifts to the employer to show that it is unable to accommodate the employee.[80]

While the Psychiatric Enforcement Guidance is consistent with EEOC's regulations, a number of the reasonable accommodations discussed have been strongly criticized by attorneys for employers. Jonathan Mook finds the EEOC's inclusion of a "temporary job coach" as a possible reasonable accommodation problematic. In his view, this accommodation appeared out of no-

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[76] EEOC Psychiatric Enforcement Guidance, "Selected Types of Reasonable Accommodation."

[77] Barnett v. U.S. Air, Inc., 157 F.3d 744, 752–53 (9th Cir. 1998), *amended by* 196 F.3d 979 (9th Cir. 1998), *amended by* 99 Cal. Daily Op. Serv. 8645 (9th Cir. 1999), *vacated by* 201 F.3d 1256 (9th Cir. 2000). *See also* Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997) (holding that the plaintiff has the burden of showing available accommodations and that the employer cannot be found liable "merely for failing to engage in the [interactive] process itself"); White v. York Int'l Corp., 45 F.3d 357, 363 (10th Cir. 1995) (noting that the regulations only recommend an interactive process and only after the employee shows that reasonable accommodation is available); Staub v. Boeing Co., 919 F. Supp. 366, 370 (W.D. Wash. 1996) (holding that the regulations only recommend an interactive process).

[78] *See* Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 316 (3d Cir. 1999) ("[w]hile an employee who wants a transfer to another position ultimately has the burden of showing that he or she can perform the essential functions of an open position, the employee does not have the burden of identifying open positions without the employer's assistance. 'In many cases, an employee will not have the ability or resources to identify a vacant position absent participation by the employer' "); Criado v. IBM Corp., 145 F.3d 437, 444 (1st Cir. 1998) (when an employer terminated an employee with mental illness due to an alleged miscommunication over a leave of absence, a jury could find that the employer failed to live up to its responsibility to find accommodations); Taylor v. Principal Fin. Group, 93 F.3d 155, 165 (5th Cir. 1996) (holding that "the employee's initial request for an accommodation . . . triggers the employer's obligation to participate in the interactive process of determining one"), *cert. denied*, 519 U.S. 1029, 117 S. Ct. 586, 136 L. Ed.2d 515 (1996); Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996) (holding that both parties have a responsibility to participate in an interactive process and that "courts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary"). *See also* Fjellestad v. Pizza Hut, 188 F.3d 944 (8th Cir. 1999) (holding that while there is no per se liability under the ADA if the employer fails to engage in an interactive process, for summary judgment purposes failure to engage is prima facie evidence that the employer may be acting in bad faith).

[79] *Taylor*, 184 F.3d at 315. *See also* Bolstein v. Reich, 1995 U.S. Dist. LEXIS 7313, AD Cas. (BNA) 1761 (D.D.C. 1995) (attorney with chronic depression and severe personality disturbance was not a qualified individual with a disability because his requested accommodations of more supervision, less complex assignments, and the exclusion of appellate work would free him of the very duties that justified his government pay grade). The *Bolstein* court observed that the plaintiff objected to a reassignment to a lower grade for which he could have performed the essential functions of the position. *Id.*

[80] Craven v. Blue Cross and Blue Cross, No. 99-1924, 2000 U.S. App. LEXIS 12321, at *9, *10 (8th Cir. June 7, 2000).

where.[81] "The employer may make an adjustment in the workplace but the employer shouldn't need to have to hire somebody from the outside to come in and help an employee make that adjustment."[82] In fact, prior to the Psychiatric Enforcement Guidance, the EEOC in its interpretive guidance discussed this very issue, providing that "examples of supported employment include . . . hiring an outside professional ('job coach') to assist in job training."[83]

There are also disagreements about the Psychiatric Enforcement Guidance's job reassignment provision. The Psychiatric Enforcement Guidance, similar to EEOC's regulations, provides that:

> reassignment must be considered as a reasonable accommodation when accommodation in the present job would cause undue hardship or would not be possible. Reassignment may be considered if there are circumstances under which both the employer and employee voluntarily agree that it is preferable to accommodation in the present position.
>
> Reassignment should be made to an equivalent position that is vacant or will become vacant within a reasonable amount of time. If an equivalent position is not available, the employer must look for a vacant position at a lower level for which the employee is qualified. Reassignment is not required if a vacant position at a lower level is also unavailable.[84]

Mr. McDonald countered that reassignment is not always that simple. He testified, "What we have seen across the country in litigation are situations where, to grossly oversimplify, my boss has made me crazy, and therefore I need a new boss as a reasonable accommodation, or my boss has made me mentally ill, or my boss has given me a stress reaction, authority figure stress reaction."[85] He added, "Even though the current boss may be rude and unpleasant and a difficult person to work with, that is just kind of the nature of the workplace. You cannot turn that into a mental disability claim."[86] In a subsequent publication, the EEOC clarified that an "employer does not have to provide an employee with a new supervisor as a reasonable accommodation."[87]

Another difficult area of reasonable accommodation is when an employee is requesting relief from performance obligations. Some employees, Mr. McDonald testified,

> want to have different standards of performance applied to them . . . they want to somehow be given a dispensation from different kinds of quality or quantity work standards. And that is the tough issue, because you are not dealing with how could we modify the workplace, or how could we even modify the work schedule, or we could let this person work at home, or we could give them a Dictaphone, or a computer, whatever would physically make it easier.[88]

Mr. McDonald said it is "the intangibles that they want changed that produce a very difficult situation for the employer."[89]

After the Commission's ADA hearing, one Circuit Court of Appeals held that while EEOC's regulations require reasonable accommodations, the Psychiatric Enforcement Guidance specifically provides that a reasonable accommodation "does not require lowering standards or removing essential functions of the job."[90]

Conduct, Misconduct, and Discipline

The Psychiatric Enforcement Guidance provides that "maintaining satisfactory conduct and performance typically is not a problem for individuals with psychiatric disabilities," but that circumstances may "arise when employers need to discipline individuals with such disabilities for misconduct."[91]

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[81] Jonathan R. Mook, Ogletree, Deakins, Nash, Smoak & Stewart, Washington, D.C., telephone interview, Oct. 2, 1998.

[82] Ibid.

[83] 29 C.F.R. § 1630.9 app. (1999).

[84] EEOC Psychiatric Enforcement Guidance, Question 29.

[85] McDonald Testimony, Hearing Transcript, p. 235.

[86] Ibid., pp. 235–36.

[87] *See* Equal Employment Opportunity Commission, "Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act," no. 915.002 (Mar. 1, 1999), Question 32. The Enforcement Guidance on Reasonable Accommodation further provides that "[n]othing in the ADA, however, prohibits an employer from doing so. Furthermore, although an employer is not required to change supervisors, the ADA may require that supervisory methods be altered as a form of reasonable accommodation." Ibid.

[88] McDonald Testimony, Hearing Transcript, p. 232.

[89] Ibid.

[90] *Taylor*, 184 F.3d at 319 (quoting the EEOC Psychiatric Enforcement Guidance).

[91] EEOC Psychiatric Enforcement Guidance, Conduct introduction.

An employer may discipline an individual with a disability for violating a workplace conduct standard even if the misconduct resulted from a disability if the "workplace conduct standard is job-related for the position in question and is consistent with business necessity."[92]

The Psychiatric Enforcement Guidance specifically provides that "nothing in the ADA prevents an employer from maintaining a workplace free of violence or threats of violence, or from disciplining an employee who steals or destroys property."[93] In essence, if the employer would impose the same discipline on an employee without a disability, it may discipline an employee with a disability for engaging in such misconduct. If, however, the conduct standard is not job related and consistent with business necessity, "imposing discipline under them could violate the ADA."[94] Mr. McDonald characterized the requirement as imposing a "dramatic new burden" on employers.[95]

Critics, including Mr. McDonald, point to the example in the Psychiatric Enforcement Guidance of a disheveled and rude warehouse worker with an unspecified mental disability as an illustration that EEOC operates in a vacuum without adequate consideration of the realities of the workplace. In the example, an employee with a psychiatric disability works in a warehouse loading boxes for shipment. The employee does not come into regular contact with other employees and has no customer contact. The employee begins coming to work "appearing increasingly disheveled. His clothes are ill-fitting and often have tears in them."[96] The employee also becomes increasingly anti-social. Coworkers complain that the employee is abrupt and rude. "His work, however, has not suffered."[97] The Psychiatric Enforcement Guidance provides that because the warehouse worker had no customer contact and irregular coworker contact, the company's requirement in its handbook that employees have a neat appearance and be courteous to each other was neither job related for that position nor consistent with business necessity.[98] Thus, rigid application of these rules to this employee would violate the ADA, according to the EEOC.[99]

Mr. McDonald termed this a "bizarre interpretation of the ADA that runs counter to common sense as well as virtually every reported court decision on the subject."[100] He testified that it is troublesome that employers may have to accommodate misconduct on the part of mentally disabled employees if that misconduct can be linked with disability.[101] Mr. McDonald added, "It is a horrible example, and a horrible principle. I think one of the things that the EEOC is trying to do here, and I think this is just flat wrong . . . is to say that employers should have to accommodate misconduct."[102]

Mr. Imparato agreed that the Psychiatric Enforcement Guidance example is bad, but "the principle is a good principle, which is, if you are going to apply a conduct standard, a conduct rule, don't apply every rule in your employee manual equally, employ a rule that is job related and consistent with business necessity, if it is going to be used to discipline someone."[103]

Mr. Imparato testified that a good example is "a manual that says, everybody has to be at their desk at 9 o'clock, but you have some employees for whom that is not as important. . . . It doesn't make sense to apply that rule across the board, if the employee has a legitimate disability-related reason not to be able to be at their desk at 9 o'clock."[104]

During the public session at the Commission's ADA hearing, EEOC Attorney Peggy Mastroianni defended the warehouse example. Ms. Mastroianni testified that while the warehouse

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[92] Ibid., Question 30.

[93] Ibid.

[94] Ibid.

[95] McDonald and Rosman, "EEOC Guidance," p. 15. *See also* Eileen P. Kelly and Hugh C. Rowland, "Mental Disabilities Claims Under the Americans with Disabilities Act and the EEOC's Guidelines," *Labor Law Journal*, September 1997, p. 565 ("The EEOC Guidance goes right to the heart of an important issue for employers, employer autonomy. The Psychiatric Enforcement Guidance appears to undermine an employer's right to establish rules for its own workplace").

[96] EEOC Psychiatric Enforcement Guidance, Question 30, Example C.

[97] Ibid.

[98] Ibid.

[99] Ibid.

[100] McDonald and Rosman, "EEOC Guidance," p. 16.

[101] McDonald Testimony, Hearing Transcript, p. 208.

[102] Ibid., p. 216.

[103] Imparato Testimony, Hearing Transcript, p. 215.

[104] Ibid., pp. 215–16.

worker's "social skills are less than they ought to be," he is "not threatening anyone."[105] Ms. Mastroianni then asked:

> The question about this warehouse worker is this: since he is essentially working alone, what would you rather have him do? Would you rather have him stay home and collect benefits, or is it okay for him to be in your fairly isolated workplace, make money, pay his taxes, and—even though he is not the most socially acceptable person in the world—doing his job?[106]

Thus, unless the employee is violating conduct standards or is a direct threat, under the Psychiatric Enforcement Guidance he should be allowed to continue his employment.

The majority of the federal circuit courts, consistent with the Psychiatric Enforcement Guidance, have held that an employer may hold a disabled employee to the same standards of conduct to which it would hold a nondisabled employee. In rejecting arguments that misconduct caused by disability is protected, the courts have reasoned that Congress, in enacting the ADA, intended to prohibit unfair stereotypes about people with disabilities but not to shield them from the consequences of misconduct.[107]

Direct Threat and the Individual with a Psychiatric Disability

The ADA allows an employer to lawfully exclude individuals from employment, for safety reasons, if the employer can show that employment of the individual would pose a "direct threat to the health or safety of other individuals in the workplace."[108] The EEOC regulations provide that direct threat "means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."[109] The regulations require that the "determination that an individual poses a 'direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job."[110] Factors to be considered in determining whether an individual poses a direct threat include the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm.[111]

The Psychiatric Enforcement Guidance relies on both legislative history and the EEOC interpretive guidance to expand upon these regulations by requiring that "the employer must identify the specific behavior on the part of the individual that would pose a direct threat. An individual does not pose a 'direct threat' simply by virtue of having a history of psychiatric disability or being treated for a psychiatric disability."[112] Where an individual has a history of violence or threats of violence, identification of the "specific behavior" that would pose a direct threat must include "an assessment of the likelihood and imminence of future violence."[113]

Some employer advocates think this is an unreasonable and unworkable standard. Mr. Mook testified that while the Psychiatric Enforcement Guidance examples for direct threat provide some help to employers, there is a "gray area which is not directly addressed in the guidance," about whether an employer can ask an individual to "go on leave and before [coming back] to have a psychiatric evaluation [to determine if he or she is] going to be a threat to the other persons in the workplace."[114] Mr. Mook testified:

> The standard should be one where the employer has some objective evidence of behavior by an employee that is causing concern among other employees and is raising concerns with other employees. And that should be sufficient for an employer, then, in that employer's discretion, to take some type of action, such as putting an employee on leave, and before that employee would come back to work, to have that em-

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[105] Mastroianni Testimony, Hearing Transcript, p. 268.

[106] Ibid.

[107] *See* Den Hartog v. Wasatch Academy, 909 F. Supp. 1393, 1401 (D. Utah 1995) ("Only the Second Circuit—in the context of the Rehabilitation Act, not the ADA—has determined that misconduct caused by a disability is protected").

[108] 42 U.S.C. § 12113(b) (1994).

[109] 29 C.F.R. § 1630.2(r) (1999).

[110] 29 C.F.R. § 1630.2(r). The regulations contemplate that the determination will include a reasonable medical judgment relying on the most current medical knowledge and/or the best available objective evidence.

[111] 29 C.F.R. § 1630.2(r). The regulations contemplate individualized and careful assessments of the possible accommodations and the potential risks.

[112] EEOC Psychiatric Enforcement Guidance, Question 33.

[113] Ibid.

[114] Mook Testimony, Hearing Transcript, p. 242.

ployee have an evaluation pertaining to whether that employee could be a threat to the other employees.[115]

Nevertheless, courts have generally upheld the termination of employees when their behavior is determined to be threatening. In 1997, the Court of Appeals for the Seventh Circuit held:

> [I]t is true that an employer has a statutory duty to make a "reasonable accommodation" to an employee's disability, that is, an adjustment in working conditions to enable the employee to overcome his disability . . . we cannot believe that this duty runs in favor of employees who commit or threaten to commit violent acts.[116]

The court held that no ADA issue exists when an employee is fired due to unacceptable behavior, even if the behavior was precipitated by a psychiatric disability, because "threatening other employees disqualifies one."[117] Recognizing the potential liability to employers if they are forced to accommodate employees who subsequently cause harm to others, the court held that the "Act does not require an employer to retain a potentially violent employee. Such a requirement would place the employer on a razor's edge—in jeopardy of violating the Act if it fired such an employee, yet in jeopardy of being deemed negligent if it retained him and he hurt someone."[118]

Impact of the Criticisms of the Psychiatric Guidance

As discussed, issuance of the Psychiatric Enforcement Guidance sparked a national media frenzy, highlighted by editorials painting nightmare scenarios of manipulative substandard employees with headlines such as "Employers are Terrified." The *Richmond Times* printed a cartoon of a Friday-the-13th-type character, complete with hockey mask and raised ax, as an example of an applicant protected by the ADA.[119] Many advocates see this sustained attack in the media and the proposals to roll back protections as "precursor[s] to attacks on the Act's protection for people with psychiatric impairments."[120]

Indeed, the most outspoken opponents of the ADA's protections for individuals with psychiatric disabilities suggested the elimination of the ADA psychiatric coverage. At the Commission's ADA hearing, one panelist said:

> One possibility would be simply to rewrite the definition of disability so that it excludes mental disabilities. Many of the horror stories that we've heard—and I don't think—by calling them horror stories, I don't mean to indicate that they aren't true. I think that there are a lot of true horror stories, and I think a disproportionate number of them involve the application of the ADA to individuals with mental disabilities.
>
> [Excluding coverage for mental disabilities] would be a quick and relatively clean way, I think, to solve a lot of the problems that the ADA has presented.[121]

Employment lawyers suggest an alternate solution less dramatic than the elimination of ADA mental disability coverage, proposing the EEOC hold formal notice and comment rulemaking. Mr. McDonald said:

> [I]t would be very helpful for there to be a notice and comment and rulemaking procedure over some regulations for the application of the ADA to mental disabilities, to replace this guidance, where the input of employers, the mental health community, advocates for the mentally disabled, can all have their say, and the EEOC, or whoever is going to develop this guidance, responsibly, with due regard to the practical application of all of this, as opposed to letting this be developed through litigation, where people are suing for money, in an adversarial process.
>
> Judges don't understand it, employers don't understand it, most lawyers don't understand. But to try to develop the law in an adversarial proceeding, when you have very little in the way of hard standards is very dangerous and problematic.[122]

Mr. Mook added that a notice and comment rulemaking effort, which "seek[s] public com-

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[115] Ibid., p. 243.

[116] Palmer v. Circuit Court, 117 F.3d 351, 352 (7th Cir. 1997), *cert. denied*, 522 U.S. 1096 (1998).

[117] *Id.* at 352.

[118] *Id.*

[119] Center, Guidance on Psychiatric Disabilities Advances ADA Awareness.

[120] Bazelon Center for Mental Health Law, "Political and Legislative Attacks," <http://www.bazelon.org/ada.html>. *See also* Marca Bristo, chairperson, National Council on Disability, Letter to the Editor, *Washington Times*, July 27, 1998, <http://www.ncd.gov/correspondence/wt_7-27-98.html>.

[121] Roger Clegg, Testimony, Hearing Transcript, pp. 43–44.

[122] McDonald Testimony, Hearing Transcript, pp. 250–51.

ment, both from employers and from other interested groups," would provide "clarity to this very difficult area of the law."[123]

The EEOC, however, issues all of its Enforcement Guidance without notice and comment rulemaking. The EEOC issues subregulatory guidance—which requires no formal notice and comment—because "it allows the Agency to move in a more timely and efficient manner to address important developing issues."[124] The courts, moreover, are now relying on the Psychiatric Guidance and holding that EEOC's interpretation of the ADA is entitled to deference.[125]

Despite the initial concerns of employers that the Psychiatric Enforcement Guidance is overbroad, courts have nevertheless sided with employers in the vast majority of cases where workers claimed discrimination based on mental disability. The reasons employers succeed in a significant percentage of mental disability cases are similar to the reasons employers prevail in a high proportion of all Title I ADA cases.[126] In Title I cases, "procedural and technical requirements contained in the ADA, as interpreted by the courts, create difficult obstacles for plaintiffs to overcome."[127]

To date, much of the litigation regarding psychiatric disability claims involves the threshold question of whether a person has a disability.[128] The plaintiff has to prove that he or she has a "mental impairment" and that this mental impairment "substantially limits" one or more "major life activities." These three aspects of the definition of disability have proven to be significant and often insurmountable hurdles.

Title II: Public Entities and Individuals with Mental Disabilities

People with psychiatric disabilities are the only Americans who can be denied their freedom, who can be institutionalized or incarcerated without being convicted of a crime, with minimal respect for their due process rights.[129]

Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or shall be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity."[130] The ADA defines a public entity as "any State or local government [and] any department, agency, special purpose district, or other instrumentality of a State or States or local government."[131] It defines a "qualified individual with disability" as a person with a disability "who, with or without reasonable modifications . . . meets the essential eligibility requirements for the receipt of services or the participation in programs . . . provided by a public entity."[132]

Department of Justice (DOJ) regulations implementing the provisions of Title II provide that public entities, including federal, state, and local agencies, are required to "operate each service, program or activity so that the service, program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities."[133] The regulations also stress the integration of individuals with mental disabilities—both individuals with psychiatric disabilities and the mentally retarded—into society. The regulations further require public entities to "administer services, programs, and activities in the most

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[123] Mook Testimony, Hearing Transcript, pp. 209–10.

[124] U.S. Commission on Civil Rights, *Overcoming the Past, Focusing on the Future: An Assessment of EEOC's Enforcement Efforts*, 2000, p. 83 (internal quotations omitted). Additionally, "notice and comment comes at a substantial price in terms of time and resources and could extend the process to well over two years." Ibid., fn. 75.

[125] *See* Olson v. Dubuque Community Sch. Dist., 137 F.3d 609 (8th Cir. 1998). *See also* Ralph v. Lucent Technologies, Inc., 135 F.3d 166, 170 (1st Cir. 1998) (holding that accommodation of a disability by providing for part-time work is authorized by the ADA and EEOC's Psychiatric Enforcement Guidance).

[126] *See* discussion on Survey of Employment Decisions in chapter 3 of this report.

[127] John Parry, "Trend: 1999 Employment Decisions Under the ADA Title I—Survey Update," *Mental & Physical Disability Law Reporter*, May/June 2000, American Bar Association, pp. 348–50.

[128] Michael Higgins, "No Sudden Impact: Courts Rejecting Mental Disability Claims Despite EEOC Guidelines Intended to Protect Mentally Ill," *ABA Journal*, November 1997, p. 25.

[129] PR Newswire Association, Inc., "National Council on Disability Calls for Changes in the Treatment of People labeled with Psychiatric Disabilities," Jan. 20, 2000.

[130] 42 U.S.C. § 12132 (1994).

[131] 42 U.S.C. § 12131(1). Title II applies to state and local government bodies. 42 U.S.C. §§ 12111(2), (5), 12112(a).

[132] 42 U.S.C. § 12131(2) (1994).

[133] 28 C.F.R. § 35.150(a) (1999).

integrated settings appropriate to the needs of qualified individuals with disabilities."[134]

During the Commission's ADA hearing, the panelists discussed Title II with respect to the issue of integration and availability of community services.

Most Integrated Settings Requirement

Many thousands of families in the United States provide care for sons and daughters with mental retardation. Many of them depend on community supports and services to assist them in meeting the needs of their family member. Tragically, however, in most states, when these families seek services and supports, they come face to face with lengthy and sometimes unending waiting lists.[135]

Congress in the ADA explicitly identified unjust segregation of persons with disabilities as a form of discrimination.[136] DOJ regulations provide that integration is fundamental to the purposes of the ADA because "provision of segregated accommodations and services relegates persons with disabilities to second-class status."[137]

The DOJ's mandate to public entities to integrate may have had the unforeseen result of creating longer waiting lists for those seeking to be integrated in community-based settings. Although public entities are now required to integrate, these entities do not always get the resources they need to provide these services.

Sharon Davis of The Arc, a national organization on mental retardation,[138] released a study in November 1997 documenting the time individuals with mental disabilities wait to receive community services.[139] She observed that 52,072 were waiting for residential services, 64,962 needed day/vocational services, and another 35,852 were waiting for both. Dr. Davis also said there were 5,376 people in state institutions waiting for community placement.[140] Dr. Davis also found that states choose not to maintain waiting lists for a variety of reasons, including fear of litigation, a desire not to bring public attention to the problem, fear that the waiting lists will grow as more individuals find out about or discover services, and an inability to collect and synthesize the data from the local programs across the state.[141]

Despite these numbers, there is strong support to continue to pursue the mandate to integrate individuals with mental disabilities. A. Kathryn Powers, director of the Rhode Island Department of Mental Health, testified at the Commission's ADA hearing about the movement from institutions to community-based programs for those with mental disabilities:

> The principle that services should be provided in most integrated public settings is supported by the values, and by the professionalism of those who administer our public health system, and certainly by consumers. In my own state of Rhode Island, we have been able to close our only state psychiatric hospital, and have entered what I call the era of community membership that focuses all services and supports toward people with mental illness building toward recovery.[142]

While there is great support for integrated settings in the advocacy community, integration is not without its critics. Opponents of the deinstitutionalization movement often contend that community placement poses safety concerns. E. Fuller Torrey, president of the board at the Torrey House, disputed this contention. He testified that "discrimination against individuals

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[134] 28 C.F.R. § 35.130(d) (1999).

[135] Sharon Davis, "The Arc: A Status Report to the Nation on People with Mental Retardation Waiting for Community Services," The Arc, November 1997, p. 1 (hereafter cited as Davis, "The Arc"). Dr. Davis is the director of The Arc's Department of Research and Program Services.

[136] 42 U.S.C. § 12101(a)(2), (5) (1994).

[137] 28 C.F.R. app. A., Part 35 § 35.130 (1999).

[138] The Arc, formerly the Association for Retarded Citizens of the United States, is a national organization dedicated to improving the rights and treatment of persons with mental retardation. The Arc studies issues concerning persons with mental retardation and produces pamphlets, reports, brochures, letters, and other information concerning persons with mental retardation. Its publications range from reports on national waiting lists to pamphlets for police officers on how to treat suspects with mental retardation. The Arc's national headquarters are located at 500 E. Border St. S-300, Arlington, TX 76010. Its phone numbers are (817) 261-6003 and (817) 277-0553 (TDD).

[139] Davis, "The Arc."

[140] Ibid., p. 2. At the time of Dr. Davis' study, only 16 states reported information on transfers from institutions to community-based residential settings, like group homes. Ibid.

[141] Ibid., p. 12.

[142] A. Kathryn Powers Testimony, Hearing Transcript, pp. 123–24.

with psychiatric illness is being driven almost completely by the perception by the general population that they are more dangerous than the general population."[143] Dr. Torrey stated the media often highlight criminally violent behavior committed by individuals with mental disabilities, even though most of these individuals are not being properly treated. He believes that violent acts by individuals who are not being treated make it easier for states to reject community-based placement for individuals with mental disabilities and to discriminate against them in general.[144]

Opponents also raise cost as an integration issue. Panelists at the Commission's ADA hearing addressed this contention. Joseph Rogers, executive director of the Mental Health Association and a person who has been institutionalized and has a mental disability, noted that high quality community-based care could be more expensive for individuals with multiple disabilities:

> The Torrey House is a model of that kind of program, where you take people who have those kind of severe disabilities, usually multiple problems, not just mental illness, but other things added in there. . . . The problem is it costs money, and a lot of states don't want to spend that kind of money. They do want, in some cases, just to dump them in a boarding home and walk away from that kind of model.[145]

Ira Burnim, legal director of the Judge David Bazelon Center for Mental Health Law, testified that despite these contentions, institutionalization of an individual is, in fact, more expensive than community-based placement.[146]

Olmstead's Integration Mandate

The Supreme Court, in *Olmstead v. L.C.*,[147] had the opportunity to consider whether the ADA mandated the integration of individuals with mental disabilities; the Court, while recognizing the need to consider integrated settings, did not mandate them.

In *Olmstead*, the Supreme Court upheld an Eleventh Circuit decision that segregation of individuals with mental disabilities might constitute discrimination based on disability.[148] *Olmstead* held that states have an obligation under the ADA to provide community placement for individuals when three conditions are met: (1) the state's treatment professionals determine that such a placement is appropriate; (2) the affected individual does not oppose the placement; and (3) the state can reasonably accommodate the placement without creating a fundamental alteration to its program, given the state's available resources and the needs of other individuals with mental disabilities.[149]

The holding in *Olmstead* does not *require* community-based services in lieu of institutionalization; however, it does require states to do more thorough analyses of individuals before refusing to provide treatment in community-based settings. Indeed, patients' rights groups, in light of the Supreme Court's interpretation of Title II of the ADA in *Olmstead*, have pressed state and local government agencies to re-examine and try to improve the services they provide to individuals with mental disabilities.[150] The Clinton administration has also suggested that states re-evaluate the services provided to hundreds of thousands of people in nursing homes and mental institutions.[151] Similarly, Donna E. Shalala, the Secretary of Health and Human Services, issued a letter to the governors of every state and the state Medicaid directors, addressing the implications of *Olmstead*, stating "[n]o person should have to live in a nursing home or other institution if he or she can live in his or her community. . . . Unnecessary institutionalization of individuals with disabilities is discrimination under the Americans With Disabilities Act."[152]

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[143] E. Fuller Torrey Testimony, Hearing Transcript, p. 130.

[144] Ibid.

[145] Joseph Rogers Testimony, Hearing Transcript, p. 142.

[146] Ira Burnim Testimony, Hearing Transcript, p. 144; Powers Testimony, Hearing Transcript, p. 151.

[147] 527 U.S. 581 (1999).

[148] *Id.* at 587.

[149] *Id.*

[150] Bobby Denniston, "Indiana needs a plan for integrating the disabled," *Indianapolis Star*, Jan. 24, 2000, p. A09.

[151] Robert Pear, "U.S. Seeks More Care for Disabled Outside Institutions," *New York Times*, Feb. 13, 2000, section 1, p. 24 (hereafter cited as Pear, "U.S. Seeks More Care").

[152] *Disability Compliance Bulletin*, vol. 17, no. 3 (Mar. 24, 2000). "As explained in the letter to state Medicaid directors, the decision in Olmstead requires states to provide community-based services for eligible persons with disabilities if: The state's treatment professionals determine that such placement is appropriate; The eligible individuals do not oppose the placement; The placement can be reasonably accommodated, taking into account the state's resources and

In response, state administrators are trying to move toward community-based placement. In Iowa, Cathy Anderson, the chief deputy director of policy for the Department of Human Services, stated, "We have a lot of plans in place. Our goal is to be continually improving the options and the quality of options to people."[153] Similarly, Judith Anne Conlin, executive director of the Iowa Department of Elder Affairs, suggested that community-based planning "just make[s] sense, whether it is mandated or not."[154]

Pennsylvania has also moved thousands of residents from state hospitals and institutions for the retarded into community-based settings pursuant to a five-year plan that the governor's administration is now enforcing.[155] This was the result of a federal court's determination that the Pennsylvania Department of Public Welfare discriminated against individuals confined to a Haverford institution when community-based placement in integrated settings was more appropriate.[156]

Although some state and local agencies are moving toward integrated settings, some legal scholars insist that the majority's decision in *Olmstead* allowed the states enough discretion to evade community-based placement. One scholar explained:

> Among the elements necessary for a finding of discrimination, the Court included the recommendation from a patient's state psychiatrists that integrated, community-based treatment is appropriate for the patient. Unfortunately, the Court's deference to the professional judgment of state psychiatrists may have an unwelcome result. State institutional administrators seeking to avoid compliance with the ADA for financial reasons have opportunities to create institutional cultures in which mental health professionals—despite standards of professional ethics—are encouraged to withhold recommendations for community treatment. In order to achieve Congress's objective of segregating and isolating fewer mentally disabled patients in institutions, the Court should have permitted patients to contest, in a truly adversarial process, the judgment of state psychiatrists who fail to recommend community treatment.[157]

Another source asserted:

> [I]t is highly significant that in the first part of its ruling, the Court made the powerful statement that the unjustified segregation of individuals with mental disabilities in institutions constitutes discrimination under the ADA. At the same time, however, it is disappointing that in the second part of its ruling, the Court conditioned the right of individuals with mental disabilities to live in the most integrated setting appropriate in a broader interpretation of the reasonable-modifications regulation.[158]

There is a concern that *Olmstead* allows public entities a fair amount of latitude in determining who is de-institutionalized. In *Rodriguez v. City of New York*,[159] a class action was brought against New York City for failing to provide safety monitor services along with other personal care services to Medicaid recipients who had mental disabilities and who needed assistance with daily living tasks.[160] The court held that the city's failure to provide the services was not discriminatory because the city did not provide this type of assistance to people with physical disabilities.[161] The court also held *Olmstead* did not stand for the proposition that states must provide individuals with disabilities with the opportunity to remain out of institutions.[162]

Similarly, while acknowledging *Olmstead*, state courts have not always required a move to community settings. *In re Bear*[163] found that

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the needs of other receiving state-supported disability services." Ibid.

153 Lynn Okamoto, "Iowa Keeps Abreast of Services to Disabled," *Des Moines Register*, Feb. 16, 2000, p. 3.

154 Ibid.

155 "Back to the Community; Court Ruling Nudges Deinstitutionalization Effort," *Pittsburgh Post-Gazette*, Mar. 20, 2000, p. A-14.

156 Kathleen v. Dep't of Public Welfare, 1999 U.S. Dist. LEXIS 19498, 19498–99 (E.D. Pa. 1999).

157 "Leading Cases: III. Federal Statutes, Regulation, and Treaties," *Harvard Law Review*, vol. 113 (1999), pp. 326, 327.

158 Joanne Krager, " 'Don't Tread on the ADA': Olmstead v. L.C. Ex. Rel Zimring and the Future of Community Integration for Individuals with Mental Disabilities," *Boston College Law Review*, vol. 40 (1999), pp. 1221, 1223.

159 197 F.3d 611 (2d Cir. 1999).

160 Rodriguez v. City of New York, 197 F.3d 611, 612 (2d Cir. 1999).

161 *Id.* at 619.

162 *Id.*

163 "Courts of Common Pleas: Family Law—*In re Bear*," PICS No. 00-0196, *Pennsylvania Law Weekly*, Feb. 21, 2000, p. d11. This is a Pennsylvania Court of Common Pleas case that is not published or in electronic format. Psychiatric cases, outside of employment, are often sealed or the parties'

state law indicated a preference for the least restrictive alternative, not a mandate.[164] The *Pennsylvania Law Weekly* noted that the *In re Bear* court relied on *Olmstead* in making its decision not to transfer a profoundly mentally retarded individual from a residential care institution at the Selinsgrove State Center in Snyder County to a community-based program.[165] According to the *Pennsylvania Law Weekly*, the court found that the most appropriate placement for Steven Bear was where he had lived for 44 of his 47 years. In short, the court rejected the argument put forward by several health care specialists—specifically, that an individual like Mr. Bear could be, or perhaps even should be, provided with enough community services to lead a more independent life.[166]

Nevertheless, *Olmstead* has paved the way for more de-institutionalization and has refocused the debate. State and local municipalities are now more eager to maintain that they wish to provide community-based placements and services to individuals with mental disabilities. It remains to be seen whether states will take action to further these integration goals. If not, the waiting lists for individuals needing these services will only increase.

The Future under Olmstead

Despite the Supreme Court's holding in *Olmstead*, those defending the rights of individuals with mental disabilities believe they must still debate the same issues. Some legal scholars believe that *Olmstead* left the states with overbroad discretion. First, the state, through its employees, may determine whether an integrated setting is the most appropriate environment for a particular individual. Second, the state may still argue that placement of a particular individual or individuals would fundamentally alter its existing program. Third, and most importantly, financial constraints are an important concern because the amount of funding that states actually provide is still under their control. In short, individuals with mental disabilities, or those representing such individuals, still need the approval of the state's "treatment professionals," and they must argue their cases to state agencies, which may be unwilling or unable to provide community placement because of the cost of the program, the fear of increased use of such programs, and/or the fear of liability.

To avoid the costs associated with providing such expensive integrated settings, states will argue, in light of *Olmstead*, that placement of certain individuals, particularly those with multiple health problems such as mental illness and Alzheimer's disease, would fundamentally alter their existing programs. Instead of maintaining that there are not enough places available for such individuals, states might argue that they have to create entirely new programs to accommodate these individuals and that this is an unreasonable request. As the debate over *Olmstead*'s true mandate is waged, the ultimate question is whether state governments and local municipalities, perhaps with some assistance from the federal government, are willing to allocate the money and resources necessary to pay for the types of services needed by individuals with mental disabilities.

Whether individuals are in institutions or in community-based group homes is an important issue; equally important is whether these individuals, when placed in community settings, are getting the services and programs necessary to assist them in leading full and productive lives. Similar to institutions, abuse also occurs in community-based group homes.

In Washington, D.C., for example, a series of *Washington Post* articles uncovered various cases of gross neglect and abuse in the city's group homes.[167] These articles highlight the difficulty of getting needed community services to de-institutionalized individuals with mental disabilities through the city's bureaucracies. One of the *Post's* articles reported:

> The District's taxpayer-funded programs for the retarded are among the most expensive in the country, with an average cost per patient of more than

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names are redacted, and they are difficult to find in the public record.

[164] Ibid.

[165] Ibid.

[166] Ibid.

[167] Katherine Boo, "Olympic Achievement Out of Reach," *Washington Post*, Mar. 14, 1999, p. A1. Katherine Boo, "Residents Languish; Profiteers Flourish," *Washington Post*, Mar. 15, 1999, p. A1. Katherine Boo, "System Loses Lives and Trust," *Washington Post*, Dec. 5, 1999, p. A1. Marcia Slacum Greene and Lena H. Sun, "Deaths Put D.C. Group Home Under Scrutiny," *Washington Post*, May 18, 2000, p. A1. Barbara Vobejda, "Concerns Raised About Program for Retarded," *Washington Post*, May 19, 2000, p. A1.

$100,000 a year. The Washington Post found that, with minimal oversight by city agencies and the D.C. Council, the care of the retarded and millions of dollars in public funds had been entrusted to a convicted nightclub owner and several companies with long histories of abusing or neglecting their wards. Documented abuse went unpunished: From 1990 to 1999, the city failed to issue a single fine against a company found to have mistreated a mentally retarded person. And 50 deaths in the last three years went unexamined by city officials.[168]

In a Florida case, a jury found in favor of a profoundly mentally retarded child who had been abused in Florida group homes.[169] The Florida Department of Health and Rehabilitative Services had placed Kimberly Godwin in a group home at the age of 10.[170] When the agency found that Ms. Godwin was being abused, it moved her to the Schenck Group Home in Fort Pierce, Florida. Despite signs of physical abuse at this institution as well, state caseworkers failed to follow-up on the allegations of mistreatment.[171] In December 1991, it was discovered that Ms. Godwin was pregnant. When the pregnancy was detected, she was again moved to another home but received no prenatal care for two months.[172] When Ms. Godwin was 20 weeks pregnant, her parents were informed, and she was hospitalized. She obtained an abortion, and then she returned to her parents' house. Based on these facts, the jury awarded Ms. Godwin $8 million.[173]

On January 20, 2000, the National Council on Disability issued a report to President Clinton regarding the treatment and rights of individuals with disabilities titled *From Privileges to Rights: People Labeled with Psychiatric Disabilities Speak for Themselves.*[174] In its report, the NCD maintained that the rights of individuals with psychiatric disabilities are routinely violated and that they are not treated as full citizens much less as human beings.[175] The NCD based its report on the comments of various individuals with psychiatric disabilities who testified at a hearing it held in Albany, New York, in November 1998.[176] Moreover, the NCD called on the President and Congress to address the problems that have made the treatment of persons with mental disabilities "a national emergency and a national disgrace."[177] The agency outlined several core recommendations that it believes should be considered to help resolve the mistreatment of these persons, including a movement toward voluntary treatment, the involvement of individuals with mental disabilities in the design of these services, a ban on aversive treatment and the development of cultural alternatives, an increase in the types of services offered, the modification of SSI and SSDI to support integration, and the introduction of a system that allows existing agencies to coordinate their actions and work together.[178]

Individuals with Mental Disabilities and Law Enforcement

There are approximately ten million Americans who experience some emotional or mental disturbance serious enough to require treatment. As a law enforcement officer, you will certainly encounter mentally ill individuals in the course of your work.[179]

Today, the delivery of law enforcement services and programs to individuals with mental disabilities is an emerging issue under Title II of the ADA, and there is little case law in this area

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[168] Katherine Boo, "U.S. Probes D.C. Group Homes," *Washington Post*, May 4, 1999, p. A1.

[169] "Verdict and Settlements," *National Law Journal*, May 15, 2000, p. A13. Please note this is a secondary cite. This case is not yet available in print or electronic format (citing Godwin v. State of Florida Dep't of Health and Rehabilitative Servs., No. 95774CA-11 (Cir. Ct. St. Lucie Co., Fla. 2000)).

[170] Ibid.

[171] Ibid.

[172] Ibid.

[173] Ibid.

[174] National Council on Disability, "From Privileges to Rights: People Labeled with Psychiatric Disabilities Speak for Themselves," Jan. 20, 1999, <http://www.ncd.gov/newroom/publications/privileges.html>.

[175] Ibid., p. 5.

[176] Ibid., p. 4.

[177] Ibid., p. 6.

[178] Ibid., pp. 4, 6–9. The NCD report provides an in-depth analysis, and its recommendations are a starting point for addressing the problems associated with providing services to individuals with psychiatric disabilities under the ADA.

[179] Law Enforcement Resource Center, "Police and People with Disabilities: Facilitator Guide" (Minneapolis, MN: Law Enforcement Resource Center, 1996), p. 11 (hereafter cited as LERC, Facilitator Guide).

to date.[180] Most of the material on the subject is privately published information from disability rights organizations and law enforcement research institutes.[181] Nevertheless, it is an important area because nearly every aspect of law enforcement is subject to Title II of the ADA and has the potential to result in significant state and local liability. The Department of Justice's primary technical assistance document, which is distributed to local law enforcement entities, states the ADA "affects virtually everything that officers and deputies do" in the delivery of law enforcement services to individuals with disabilities. This includes receiving citizen complaints; interrogating witnesses; arresting, booking, and holding suspects; operating telephone (911) emergency centers; providing emergency medical services; enforcing laws; and other miscellaneous duties.[182]

The services and programs provided to individuals with mental disabilities have become important because the probability of an individual with a disability becoming involved with law enforcement—as a victim, witness, or suspect—will increase dramatically as the trend continues toward full integration and participation in our society for individuals with mental disabilities.[183]

Law Enforcement and Individuals with Psychiatric Disabilities

The ADA requires that police officers ensure effective communication with individuals who are deaf or hearing impaired. The obligation to have interpreters and other communication devices does not apply if it creates an undue burden, which is determined by considering all of the resources available to a police or sheriff's department.[184] Even if there is an undue burden, the department must seek alternatives that ensure effective communication to the maximum extent feasible.[185] This obligation also includes effective interaction with individuals with psychiatric disabilities.

Police officers are often the first to respond to calls involving mental illness. To assess whether they are encountering an individual with mental illness they may gather information from bystanders, family members, or observations of the individual at the scene. The symptoms of mental illness include, but are not limited to, a history of mental illness or possession of prescription medication for it; bizarre appearance, movements, or behavior; unresponsiveness or lack of emotion; agitation without clear reason; exaggerated self-confidence; delusional grandiose ideas; hallucination; or perception unrelated to reality.[186] The ability to recognize possible symptoms of mental illness and respond in the appropriate manner could be crucial to effective enforcement of a situation.

At the Commission's ADA hearing, Jim Ramnaraine, a senior human resources representative from the Hennepin County (Minnesota) Police Department, spoke about the difficulty of recognizing individuals with mental disabilities and responding appropriately:

> The American Medical Association released a report that said that the doctors working as general practitioners are more likely not to diagnose someone who has a mental illness under DSM-IV than to identify that person [with] a bipolar disorder or depression. So if you look at that premise, the people who are working as professional doctors in the field can't identify somebody who has a mental illness. I think it's really challenging to expect that police officers can do that based on an encounter.[187]

Mr. Ramnaraine noted that his department developed a police videotape, which is one of the first comprehensive videotape training programs in the nation. The videotape includes information on approaching individuals with mental ill-

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[180] *See* U.S. Commission on Civil Rights, "Law Enforcement: Discrimination by Law Enforcement Personnel," in *Helping State and Local Governments Comply with the ADA*, 1998, pp. 66–69. Although the Department of Justice has submitted *amicus* briefs, it has not initiated litigation against a law enforcement agency under Title II. Ibid., p. 67.

[181] Several documents were introduced at the Commission's ADA hearing held Nov. 12–13, 1998. Leigh Ann Davis provided an opening statement to the Commission and submitted several other publications that she wrote.

[182] U.S. Department of Justice, Civil Rights Division, Disability Rights Section, "Commonly Asked Questions About the ADA and Law Enforcement," n.d., pp. 1–2.

[183] Leigh Ann Davis, "People With Mental Retardation in the Criminal Justice System," The Arc, October 1995, p. 2.

[184] 28 C.F.R. app. A., Part 35 § 35.102 (1999).

[185] *Id.*

[186] Police Executive Research Forum, "Mental Illness: Police Response," n.d., p. 5.

[187] Ramnaraine Testimony, Hearing Transcript, p. 81.

ness.[188] The Police Executive Research Forum (PERF) also published a document that advises police on how to respond when interacting with victims, suspects, or other persons seeking supportive services who have mental disabilities.[189]

According to the PERF, police officers should not move suddenly, give orders rapidly, shout, "crowd" the person, express anger or irritation, and/or use inflammatory language, including some of the more common derogatory terms like "psycho" or "loony."[190] PERF also suggests that officers should stay calm and not overreact; speak simply and briefly; move slowly; remove distractions and upsetting influences from the scene; announce their actions before initiating them; and be aware that their police uniform, gun, handcuffs, and nightstick may frighten the person.[191]

Law Enforcement and Individuals with Mental Retardation

A publication titled "A Police Officer's Guide" addresses the differences between mental retardation and mental illness, explaining that they are distinct and should not be treated alike by officers.[192] Most people with mental retardation live independently in the community and may not appear to have a significant disability.[193] Moreover, mental retardation may be more difficult to detect because most individuals with mental retardation have mild retardation and may try to hide their disability in order to be liked or accepted, especially by authority figures. Law enforcement officers, with little or no training in recognizing persons who are mentally retarded, often mistake them as drunk, on drugs, or mentally ill.[194]

Advocacy groups for the mentally retarded recommend that officers make an arrest only if a crime has occurred.[195] When an arrest occurs, it is important to ensure that individuals with mental retardation understand their Miranda rights because they often answer affirmatively when asked if they understand their rights, even when they do not. The Arc has developed an extensive training program for law enforcement on effectively dealing with individuals with mental retardation.[196] The Arc recommends that officers use simple words to modify the Miranda warning and ask the person to repeat each phrase of the warning using his or her own words to check for genuine understanding rather than simple parroting of the words.[197] Although not required, The Arc also recommends videotaping the interview.[198]

In sum, police officers "should always consider the possibility that a disability is involved when faced with impaired responsiveness or behavior that doesn't make sense. . . ."[199] Taking people into custody solely because of behavior caused by their disability may deprive them of their rights and violate of the ADA.[200]

Title III: Public Accommodations and Psychiatric Disabilities

Title III of the ADA was not the subject of testimony at the Commission's ADA hearing; however, this report would be incomplete without briefly highlighting some of the more signifi-

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[188] Ibid. Besides the videotape that Hennepin County produces, The Arc also produced a videotape titled "Understanding Mental Retardation: Training for Law Enforcement," 1998.

[189] Police Executive Research Forum, "Mental Illness: Police Response," n.d., p. 6.

[190] Ibid.

[191] Ibid.

[192] Leigh Ann Davis, "A Police Officers Guide: When in Contact With People Who Have Mental Retardation," The Arc, 1996, pp. 1–2 <http://TheArc.org/ada/police.html>. Mental retardation refers to below average abilities to learn and process information and generally occurs before adulthood. Mental illness affects thought processes, moods, and emotions and can occur at any age. Ibid., p. 2.

[193] Ibid.

[194] Leigh Ann Davis, "People With Mental Retardation and the Criminal Justice System," The Arc, October 1995, p. 2.

[195] LERC, Facilitator Guide, pp. 12–13. "A Police Officer's Guide: When in Contact With People Who Have Mental Retardation," The Arc, undated pamphlet.

[196] The Arc has several publications regarding individuals with mental disabilities. *See e.g.*, "A Police Officer's Guide," and "Understanding Mental Retardation: Training for Law Enforcement," 1998.

[197] Ibid.

[198] Ibid.

[199] Police Executive Research Forum, "Take Another Look: Seizure Recognition and Management—Information for Law Enforcement Personnel," n.d., p. 2. The pamphlet advises that to protect people's rights "it is better to handle a seizure-like episode as if it is a seizure until evidence clearly points in another direction." Ibid., p. 4.

[200] Ibid.

cant issues affecting individuals with psychiatric disabilities under Title III.

Title III prohibits discrimination on the basis of disability by private entities operating public accommodations. Title III of the ADA provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.[201]

Public accommodations cover a wide array of private entities whose operations affect commerce—ranging from lodging to places of public entertainment to service establishments to transportation services.[202] Courts are divided over whether "public accommodation" applies only to actual physical structures or whether it reaches beyond mere access to the physical structures.[203]

A person alleging discrimination under Title III must show (1) that he or she is disabled within the meaning of the ADA; (2) that the defendant is a private entity that owns, leases, or operates a place of public accommodation; (3) that the defendant took adverse action against the plaintiff that was based upon the plaintiff's disability; and (4) that the defendant failed to make reasonable modifications that would accommodate the plaintiff's disability without fundamentally altering the nature of the public accommodation.[204]

Most cases brought under Title III have focused on physical disabilities, rather than mental or psychiatric impairments, and there are few reported cases of businesses being challenged for operating a public accommodation and failing to accommodate a person with a mental or psychiatric disability.[205] In *Roberts v. KinderCare Learning Centers*,[206] the Eighth Circuit Court of Appeals considered a case alleging that a day care center did not accommodate a mentally disabled child after it failed to provide one-on-one care when the child's personal care assistant was unavailable. The court found that the child was disabled within the meaning of the ADA and that KinderCare was a public accommodation. The court rejected the requested accommodation, however, finding that to require KinderCare to provide one-on-one care for the child would be an undue burden and thus "was not reasonable within the meaning of the ADA."[207]

In *Amir v. St. Louis University*,[208] the Eighth Circuit revisited the issue of Title III and mental disability and again denied the individual's claim. In this case, a graduate student (Amir) was expelled from the university's medical school. Amir alleged that the university discriminated against him based upon his mental disability in violation of Title III of the ADA. The Eighth Circuit accepted the district court's find-

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[201] 42 U.S.C. § 12182(a) (1994).

[202] *See* 42 U.S.C. § 12181(7) (1994).

[203] For example, one interesting question that is now before the United States District Court in Boston is whether the Internet is a public accommodation. In November 1999, the National Federation of the Blind filed a lawsuit against America Online (AOL), alleging that AOL is not compatible with the software required to translate computer signals into synthesized speech or Braille, which would allow the visually impaired to access AOL. National Federation of the Blind v. America Online, No. 99CV1233EFH (D. Mass. filed Nov. 4, 1999). The Department of Justice, in 1996, issued a statement, sent to the U.S. Senate, stating that the ADA should cover government entities on the Internet. The House Judiciary Committee's Subcommittee on the Constitution held an oversight hearing in February 2000 on the applicability of the ADA to private Internet sites. The courts have yet to decide whether the ADA public accommodation provisions cover the Internet and e-commerce Web sites.

[204] *See* 42 U.S.C. §§ 12182(a) (1994), (b)(2)(A)(ii) (1994). As with other ADA titles, a defendant accused of discrimination has the defense of undue burden. *See* 42 U.S.C. § 12182(b)(2)(iii) (1994) (an entity is required to accommodate unless it can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered, or would result in an undue burden).

[205] One novel case regarding public accommodations that has been the subject of recent media attention is the case of professional golfer Casey Martin. Mr. Martin, who suffers from a rare congenital vascular disorder that puts him at serious risk for leg fractures and blood clots when walking, sued the Professional Golfers Association under the ADA for permission to use a golf cart during tournaments. The federal district court ruled that the use of a golf cart for a professional golfer suffering from this type of disability was a reasonable accommodation. Martin v. PGA Tour, Inc., 994 F. Supp. 1242 (D. Or. 1998), *affirmed* 204 F.3d 994 (9th Cir. 2000). The Supreme Court granted the petition for *certiorari* by the Professional Golfers Association and is expected to hear oral arguments on January 17, 2001. *See* PGA Tour, Inc. v. Martin, 121 S. Ct. 30, 2000 U.S. LEXIS 4865, 69 U.S.L.W. 3223.

[206] 86 F.3d 844 (8th Cir. 1996).

[207] Roberts v. KinderCare Learning Ctrs., 86 F.3d 844, 847 (relying on 42 U.S.C. § 12182(b)(2)(iii) (1994)).

[208] 184 F.3d 1017 (8th Cir. 1999).

ing that Amir suffered from a disability "because his obsessive compulsive disorder . . . affects his ability to eat and drink without vomiting, his ability to concentrate and learn, and his ability to get along with others."[209] The court also found that the university was a public accommodation under the ADA. The court then held that "Amir did not provide sufficient evidence from which a reasonable jury could conclude that [the university's] adverse decisions were based upon his disability."[210] The court also concluded that none of the three accommodations suggested by Amir—which included completing his psychiatry clerkship at another institution, a passing grade in psychiatry, and reassignment to another professor—amounted to a reasonable accommodation under the ADA.[211]

Title III and Insurance

The issue of insurance and psychiatric disabilities has been the focus of several ADA discrimination cases. One of the questions facing courts is whether the ADA applies to insurance policies that make benefit distinctions between physical disabilities and mental disabilities. The federal courts are divided on the scope of the ADA's application.[212]

Individuals have filed lawsuits alleging that insurance coverage differentiating between individuals with physical disabilities and those with psychiatric disabilities violates the ADA. When an individual with a psychiatric disability alleges discrimination based on an employer-sponsored long-term disability plan, he or she may file suit against the employer, the private insurance provider, or both. A lawsuit filed against the employer is usually brought under Title I of the ADA; a suit against the insurer generally invokes Title III protections.[213] The lawsuits filed generally allege that the ADA is violated when long-term disability benefits are limited for mental disabilities and not limited for physical disabilities.[214]

There is a split in the federal courts for cases determining the applicability of Title III to insurance coverage decisions. In *Weyer v. Twentieth Century Fox Film Corp.*,[215] the United States Court of Appeals for the Ninth Circuit held that a group disability insurance policy that provided more benefits for physical disabilities than mental disabilities did not violate the ADA.[216] The court agreed with the insurance company's claim that it did not meet the definition of a public accommodation because the ADA statute implies a physical place. The court held that while the insurance office was in fact a physical place, "this case is not about such matters as ramps and elevators so that disabled people can get to the of-

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[209] Amir v. St. Louis Univ., 184 F.3d 1017, 1027 (8th Cir. 1999).

[210] *Id.*

[211] *Id.* at 1028.

[212] A related issue, beyond the scope of this report, is whether Title III applies to the services provided by insurers as opposed to the physical access to their offices.

[213] The issue of insurance coverage for long-term disability benefits under Title I has resulted in a split in the circuits. The Sixth, Seventh, Ninth, and Eleventh Circuit Courts of Appeals have denied claims that limits on long-term disability benefits for mental disability—with no restrictions on long-term benefits for physical disability—are a violation under ADA. *See, e.g.*, Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104 (9th Cir. 2000) (finding that statute defines "qualified individual" to be one who can still perform "the essential functions of the employment position that such individual holds" and that plaintiff, by identifying herself as totally disabled, cannot fit within the parameters of the definition as she no longer has the ability to perform her job); EEOC v. CNA Ins. Co., 96 F.3d 1039 (7th Cir. 1996) (denying standing because the disabled employee did not meet the definition of a qualified individual with a disability); Parker v. Met. Life Ins. Co., 121 F.3d 1006 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 871 (1998) (rejecting plaintiffs' standing as qualified individuals with a disability because defining "benefits recipient" as an "employment position" conflicted with the plain meaning of the statute). The Third Circuit, however, examined the same issue and reached the opposite conclusion, finding that Title I's prohibition against discrimination with respect to terms, conditions, and privileges of employment, including benefits, permits former employees to sue over their disability benefits. Ford v. Schering-Plough Corp., 145 F.3d 601, 608 (3rd Cir. 1998) (determining that qualified individuals with a disability included "former employees who were once employed with or without reasonable accommodations yet who, at the time of suit, are completely disabled").

[214] Many employers offer long-term disability plans, and most of these plans draw a distinction between mental and physical disabilities—allowing benefits for up to 18 or 24 months for persons deemed to be totally disabled due to a mental disorder and benefits until age 65 for persons considered totally disabled by physical disorders. *See, e.g.*, EEOC v. CNA Ins. Co., 96 F.3d 1039 (7th Cir. 1996).

[215] 198 F.3d 1104 (9th Cir. 2000).

[216] The insurance policy at issue provided benefits for 24 months for individuals with mental illness, whereas individuals with physical disabilities were not subject to the same limitation and could get benefits until age 65. Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1107–08 (9th Cir. 2000).

fice. The dispute in this case, over terms of a contract that the insurer markets through an employer, is not what Congress addressed in the public accommodations provisions."[217] Because the plaintiff did not claim to be unable to gain physical access to the insurance office or the goods and services located within it, she had no viable claim under Title III.[218]

Similarly, the Sixth Circuit, in *Parker v. Metropolitan Life Insurance*,[219] held that although an insurance office is a public accommodation, the plaintiff did not seek the goods and services of an insurance office; rather, "she accessed a benefit plan provided by her private employer and issued by MetLife."[220] The court concluded that a benefit plan offered by an employer is not a good offered by a place of public accommodation and determined that it is evident, under the ADA statute, that a public accommodation is a physical place.[221]

Conversely, the First Circuit, in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association*,[222] held that establishments of public accommodation are not limited to actual physical structures. The court examined the language of the ADA, which included the definition of public accommodation, and reasoned that the plain meaning did not require the conclusion that public accommodation was limited to physical structures.[223] The court held that by including "travel service" among the list of services considered as public accommodations, Congress clearly contemplated that "service establishments" include providers of services that do not require a person to physically enter an actual physical structure. Because many travel services conduct business by telephone or correspondence without requiring their customers to enter an office to obtain their services, the First Circuit concluded that it "would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result."[224]

Title III and Professional Licensing

An emerging body of case law also addresses ADA challenges to mental health inquiries in the context of applications for membership in state medical and bar associations.[225] Mental health inquiries have been and continue to be routinely requested for applications in state bars and medical boards. Licensing boards believe that questions about mental health history have the legitimate purpose of protecting the public and the profession.[226]

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[217] *Id.* at 1114. To further illustrate its point, the court analogized that a bookstore could not discriminate against individuals with disabilities in having access to the bookstore, but did not have to provide books in Braille as well as print. *Id.* at 1115.

[218] *Id.* at 1116. The court further concluded that even if the insurance company was held to be a place of public employment and the insurance policy was found to be an offered good, it would fall within the ADA's safe harbor for insurers.

[219] 121 F.3d 1006 (6th Cir. 1997).

[220] Parker v. Met. Life Ins., 121 F.3d 1006, 1010 (6th Cir. 1997).

[221] *Id.* at 1011 (relying on Stoutenborough v. National Football League, 59 F.3d 580 (6th Cir.), *cert. denied*, 516 U.S. 1028 (1995) (holding that television broadcasts of football games are not public accommodations despite that football games are held at a public accommodation)).

[222] 37 F.3d 12 (1st Cir. 1994).

[223] Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n, 37 F.3d 12, 19–21 (1st Cir. 1994). The court stated that "even if the meaning of public accommodation is not plain, it is, at worst, ambiguous." *Id.* at 19. This ambiguity, the court held, considered together with agency regulations and public policy concerns, was persuasive that the phrase was not limited to actual physical structures. *Id.*

[224] *Id.* The court recognized that there is language in the legislative history that gives the impression that Title III is primarily concerned with physical access, yet "there is nothing in that history that explicitly precludes an extension of the statute to the substance of what is being offered." *Id.* Thus, the court limited its decision to "the possibility that the plaintiff may be able to develop some kind of claim under Title III." *Id.*

[225] Cases challenging the discriminatory actions of licensing agencies or professional committees/associations have been brought under both Title II and Title III of the ADA. *See* Anonymous v. Connecticut Bar Examining Comm., CV 94 0534160 S (Conn. Super. Ct. Jud. Dist. Hartford/New Britain 1994) (challenging bar association, as public entity under Title II, with discrimination for denying admission to the bar based on applicant's disclosed mental health history).

[226] *See, e.g.*, Deborah L. Rhode, "Moral Character as Professional Credential," *Yale Law Journal*, vol. 94 (1985), pp. 491, 494 (bar associations are interested in protecting their image and economic well-being and "A single [unfit or presumptively unfit] lawyer brings 'disrepute to the whole profession,' penalizing the thousand who slave 'mightily and righteously' "); Phyllis Coleman and Ronald A. Shellow, Restricting Medical Licenses Based On Illness Is Wrong—Reporting Makes It Worse, *Journal of Law & Health*, vol. 9 (1994/1995), pp. 273, 277 ("Medical boards face the difficult but essential task of protecting the public from incompetent

In response, some mental health advocates argue that professional licensing boards' inquiries into an applicant's mental health history must be eliminated because they violate the ADA's broad prohibition against discrimination.[227] Other advocates argue that mental health questions are permissible if they are limited to recent or severe instances of mental illness.[228] Still others urge that only questions pertaining to certain conduct be permitted.[229]

The courts have varied in their responses to these challenges, but the majority have held that broad questions about an individual's mental health violate the ADA—leaving open the possibility that narrowly tailored questions will not be prohibited.[230]

The interaction between the ADA and psychiatric disabilities is constantly evolving, and there are still many unanswered questions that likely will be resolved by the courts. For individuals with psychiatric disabilities, there have been meaningful strides in the past 10 years, but there is still much to be accomplished.

For too long, mental health has been put in parenthesis; we did not want to talk about it, and we did not take it seriously as a country. The stigma of mental illness has kept many in need from seeking help, and it has prevented policymakers from providing it.[231]

physicians. Indeed, licensing boards are widely, if dimly, perceived as the keepers of the gate of the medical profession") (citation omitted).

[227] *See* Comment: "Challenging a State Bar's Mental Health Inquiries Under the ADA," *Houston Law Review*, vol. 32 (Winter 1996), pp. 1384, 1386.

[228] Ibid., p. 1386.

[229] Ibid.

[230] Several courts have enjoined bar committees from inquiries into applicants' histories of having been treated for mental disorders, but others have declined to do so. *Compare* Clark v. Virginia Bd. of Bar Exam'rs, 880 F. Supp. 430 (E.D. Va. 1995), and Ellen S. v. Florida Bd. of Bar Exam'rs, 859 F. Supp. 1489 (S.D. Fla. 1994) (enjoining inquiries), *with* Campbell v. Greisberger, 865 F. Supp. 115 (W.D.N.Y. 1994), and McCready v. Illinois Bd. of Admissions to the Bar, No. 94C3582, 1995 WL 29609 (N.D. Ill. Jan. 24, 1995) (allowing inquiries). In Medical Society v. Jacobs, 1993 WL 41306 (D.N.J. 1993), a state medical board was prohibited from asking about alcohol or drug abuse and mental or psychiatric illness.

[231] The Health Insurance Reform Act of 1995, S. 1028, 104th Cong., 142 Cong. Rec. S3589 (1996) (statement of Sen. Wellstone).

Findings and Recommendations

CHAPTER 1: THE ROAD TO THE ADA

Findings

- Historically our nation's disability policies were premised on a medical/charity model where disability was to be addressed by doctors and other professionals who were to cure or fix the individual with a disability; if he or she could not be "cured," the individual may be entitled to some type of charitable benefit.

- The Supreme Court has refused to find that individuals with disabilities are a suspect or even a quasi-suspect class, which would have required that laws affecting individuals with disabilities serve a compelling state interest or at least be substantially related to an important governmental interest.

- In moving away from a medical/charity model and attempting to provide individuals with disabilities more meaningful access to all facets of community life, numerous laws were enacted to address specific issues confronting individuals with disabilities ranging from access to federal facilities, education, air travel, voting, housing, and federal employment.

- With the passage of the Americans with Disabilities Act, our nation moved from the medical/charity model to a civil rights model that attempts to provide a level playing field for individuals with disabilities by affirmatively securing the right of access to, and independence in, all aspects of society.

- The ADA, which was signed into law on July 26, 1990, is a comprehensive civil rights law seeking to ban discrimination against individuals with disabilities by ensuring equality of opportunity, full participation in government services and public accommodations, independent living, and economic self-sufficiency.

CHAPTER 2: THE EFFECTS OF THE ADA

Findings

- Individuals with disabilities believe the ADA has made a great difference in their lives. The ADA has increased the level of participation in mainstream American society, including better access to buildings, greater access to transportation, and fuller inclusion in the community.

- Since the passage of the ADA, the public is more sensitive to and aware of people with disabilities.

- Individuals with disabilities continue to face discrimination and difficulty in overcoming barriers that prevent them from fully participating in mainstream American society, particularly in the areas of employment, access to medical benefits, and access to public transportation.

Recommendations

2.1 The Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ) should continue their aggressive efforts in implementing and enforcing the mandates of the ADA.

2.2 The EEOC, the DOJ, and the Department of Transportation must become more proactive in their efforts in enforcing the ADA beyond the traditional areas of coverage and in educating

the public on the requirements of and rights provided by the ADA.

Findings

- General access to public accommodations and public services has improved for people with disabilities since the ADA.

- There continues to be areas that need greater improvement such as access to medical facilities and public transportation.

Recommendations

2.3 The DOJ should play a more proactive role in enforcing the mandates of Titles II and III of the ADA, including:

implementing a more effective complaint investigation process;

adopting a procedure to actively seek out test cases in nontraditional areas of enforcement;

undertaking compliance reviews to monitor compliance; and

using testers as a means of monitoring compliance with the ADA.

2.4 The DOJ should be allocated additional funding to provide training, education, and technical assistance for mid-size to small businesses so that they have adequate access to information on the mandates of the ADA.

Finding

- While the ADA has improved employment opportunities for individuals with disabilities, employment rates of individuals with disabilities continue to indicate that people with disabilities are less likely to be employed than people without disabilities. The available employment rate data make no distinction between disabilities. Therefore, it is difficult for the Commission to draw any substantive conclusions regarding the ADA's impact on the overall employment rates and employment opportunities for individuals with disabilities.

Recommendation

2.5 The National Council on Disability and the National Institute on Disability and Rehabilitation Research should undertake comprehensive studies focusing on employment rates, employment trends, and types of employment for individuals with disabilities. These studies should also include different types and severities of disabilities to ensure that quantitative data exist to make real comparisons of employment rates and employment opportunities for individuals with disabilities.

Finding

- While data tend to show general improvement in life for individuals with disabilities since the passage of the ADA, the data are based on studies and surveys with limited statistical and anecdotal information. There is no consistent hard empirical data to demonstrate the extent of the effectiveness of the ADA.

Recommendation

2.6 There should be continued efforts to study the overall effects of the ADA. The National Institute on Disability and Rehabilitation Research should undertake a comprehensive nationwide study of the effects of the ADA on individuals with disabilities and on businesses and employers who must comply with the ADA.

Findings

- The ADA, like all civil rights laws aimed at remedying discrimination based upon unjustified stereotypical beliefs, has costs associated with protecting the civil rights of those it is intended to protect.

- There are no significant costs in complying with the reasonable accommodation provisions of the ADA.

- While there was testimony about concerns of costly litigation created by the ADA, no empirical evidence was presented either substantiating these concerns or showing a significant number of cases filed under the ADA were determined to be frivolous.

- To the extent businesses have concerns over frivolous litigation being filed under the ADA, there are already mechanisms in place, such as through Rule 11 of the Federal Rules of Civil Procedure, which are intended to deter and remedy the filing of frivolous lawsuits or those without substantial justification.

Recommendations

2.7 Congress should provide businesses and employers that incur costs in complying with the accessibility and reasonable accommodation provisions of the ADA tax credits and other tax incentives that correlate directly with the costs incurred by them up to the actual costs incurred.

2.8 The EEOC, the DOJ, and other federal agencies charged with implementing the ADA should increase educational efforts aimed at advocacy groups and potential ADA claimants in an attempt to ensure that these groups and individuals have a clear understanding of the level and type of evidence needed to successfully maintain an ADA claim.

Finding

- The Social Security Administration (SSA) does not take into consideration the ADA's requirement of reasonable accommodation in determining continuing eligibility for disability benefits, which can discourage individuals with disabilities from re-entering the work force.

Recommendation

2.9 In an effort to further provide incentives for returning to employment, the amount of cash disability benefits should be tailored to an applicant's ability to work with a reasonable accommodation or to be rehabilitated and returned to work. After a meaningful phase-in period, the benefits could be reduced or eliminated depending upon the individual's ability to work, with the proper work supports or accommodations.

Finding

- Generally, federal disability beneficiaries are not made aware of the Social Security work incentives, which are intended to encourage them to return to work.

Recommendations

2.10 The SSA should educate its staff on the available work incentives and provide training to staff on how to explain these work incentives so that applicants understand them.

2.11 At the time of application, the SSA should ensure that all beneficiaries are informed about the work incentive initiatives.

Findings

- The employment rate of individuals with disabilities correlates with the growth rate of Social Security Income (SSI) and Social Security Disability Insurance (SSDI). When access to benefits is expanded the employment rate of individuals with disabilities drops, and when access to benefits is tightened the employment rate increases.

- On average, once beneficiaries begin to receive federal disability benefits, they remain on the disability benefits program for most of their lives.

- Once individuals with disabilities receive federal disability benefits, the SSA work incentive initiatives have only a modest effect in returning beneficiaries to the work force.

- Once a beneficiary with a disability starts to work, SSDI cash benefits are generally terminated after one year. These benefits are extended if a beneficiary's average monthly earnings do not exceed the substantial gainful activity (SGA) level of $700.

- Once a beneficiary with a disability starts to work, SSI cash benefits are terminated when earnings plus other income exceed the income and resource requirements.

Recommendations

2.12 The SSA should do comprehensive research on the factors that cause individuals with disabilities to remain on the Social Security

rolls. This research should distinguish between individuals who cannot work and those who may be able to work with reasonable accommodation or appropriate rehabilitation.

2.13 The SSA work incentive initiatives should extend the length of time that cash benefits are offered while the person is re-entering the work force. These benefits should be offered until the beneficiary can become reasonably self-sufficient, which is a concept the SSA should define with input from all affected stakeholders.

2.14 The SGA level should be raised. The amount should be higher than the annual salary of someone earning minimum wages. In effect, once a person's earnings exceed the SGA level, he or she should be able to live off earnings alone.

2.15 The SSI income and resource requirements should be restructured so that once a person's earnings exceed the SGA level, he or she is able to be financially self-sufficient, which is a concept the SSA should define with input from all affected stakeholders.

Findings

- Adults with disabilities often have a disincentive to work because of the high cost of personal attendant services or technologies required for employment.

- Congress recently approved a proposal by President Clinton to provide a $1,000 tax credit to cover certain work-related expenses, such as special transportation and technology.

Recommendations

2.16 Congress should provide immediate incentives to people with disabilities that offset work expenses related to disability as these expenses are incurred rather than requiring individuals with disabilities to wait until the end of the year to receive a tax benefit.

2.17 Congress should increase tax benefits through enhanced tax credits, which adequately cover work expenses related to a person's disability.

Finding

- Pursuant to Internal Revenue Code, Section 190, all businesses are allowed to deduct up to $15,000 a year for expenses incurred to remove physical, structural, and transportation barriers for persons with disabilities at the workplace.

Recommendation

2.18 Congress should provide more incentive for businesses to meet the ADA's access requirements by increasing the amount of tax credit available.

CHAPTER 3: JUDICIAL TRENDS IN ADA ENFORCEMENT

Findings

- The Supreme Court decisions in *Sutton*, *Murphy*, and *Albertsons*, that the effects of any mitigating measures must be considered, obscured the congressional vision for the ADA.

- The Supreme Court decisions in *Sutton*, *Murphy*, and *Albertsons* restricted the coverage of individuals intended to be protected by the ADA and will cause continued litigation over who is entitled to coverage by the ADA.

- The Supreme Court in *Sutton*, *Murphy*, *Albertsons*, and *Olmstead* have invited continued litigation over the validity and deference due the regulatory and interpretive guidance issued by the federal agencies on what constitutes a disability.

Recommendation

3.1 To accomplish the expressed intent of Congress, the ADA should be amended to provide that the effects of mitigating measures should not be taken into account in determining whether an individual has an impairment under the ADA.

Findings

- The Supreme Court decision in *Cleveland*, holding that a person is not automatically barred from suing under the ADA even though he or she has claimed an inability to work in an application for disability benefits, recognized the conflict in purposes between the ADA and the Social Security Act, and the fact that the Social Security Act does not require a determination of whether a person could work with a reasonable accommodation while the ADA mandates this assessment.

- While recognizing the difference in purpose between the ADA and the Social Security Act, the *Cleveland* decision still allows employers to demand an explanation of why an individual made a claim for disability benefits.

- The *Cleveland* decision invites continued litigation over this issue.

Recommendations

3.2 To avoid continued litigation, Congress should consider harmonizing the ADA and the SSA, or Congress should amend the ADA to provide that the application for, or receipt of, disability-based benefits should have no relevance to an individual's pursuit of his or her rights under the ADA.

3.3 The SSA and other federal and state agencies providing disability-based benefits based upon a certification of disability should make it clear on all forms and applications for benefits that all such certifications are for the sole purpose of determining disability under that agency's applicable laws, do not address the ADA's reasonable accommodation requirement, and are in no way a representation of limitation for the purposes of the ADA.

Finding

- The Supreme Court in *Olmstead*, recognized that "unjustified isolation" of individuals with disabilities in institutions is unlawful discrimination.

Recommendation

3.4 The appropriate federal agencies should adopt policies and programs aimed at helping states and local governments to fully implement the Supreme Court's *Olmstead* ruling as addressed more specifically in Findings and Recommendations for chapter 5 of this report.

Findings

- The Supreme Court in recent decisions has consistently ruled that as a general matter the 11th Amendment to the U.S. Constitution prohibits states from being sued in federal court by individuals for violations of federal statutes. Therefore, the provisions of these laws allowing individuals to pursue remedies in federal court were found unconstitutional.

- The Supreme Court will now hear arguments to consider whether the ADA provisions that allow private individuals to sue states in federal court are constitutional.

Recommendation

3.5 The DOJ should develop a contingent plan for active monitoring and enforcement of the provisions prohibiting discrimination by state entities in anticipation of the Supreme Court's decision. The plan should be ready for implementation in the event the Supreme Court, consistent with recent decisions, invalidates ADA provisions allowing individuals to file suit against states in federal court.

CHAPTER 4: SUBSTANCE ABUSE UNDER THE ADA

Findings

- The social and economic costs of substance abuse in America are staggering. It is estimated that the cost of alcohol and drug abuse for 1995 was $276.4 billion, of which $166.5 billion was for alcohol abuse and $109.8 billion for drug abuse.

- The ADA currently does not mandate that private industry offer programs, such as Employee Assistance Programs (EAPs), to assist workers with substance abuse problems.

- EAPs seem to play a role in helping workers obtain the treatment they need, return to work, and receive the follow-up treatment necessary to remain safe, productive, substance-free employees for the firm or company.

Recommendations

4.1 Information should be made available to employers by the EEOC and the DOJ on the economic benefits derived from establishing EAPs or similar programs.

4.2 Congress should provide appropriate tax incentives for the establishment of EAPs and similar programs within private industry.

4.3 The EEOC should form a task force, which includes stakeholders, to develop a "Handbook of Best Practices" that would illustrate successful approaches that employers in various industries have taken to comply with ADA provisions pertaining to substance abuse.

Findings

- The ADA, court decisions, and EEOC's interpretive guidelines have made it clear that:

  An employer may prohibit the illegal use of drugs and the use of alcohol at the workplace.

  It is not a violation of the ADA for an employer to give tests for the illegal use of drugs.

  An employer may discharge or deny employment to persons who currently engage in the illegal use of drugs.

  Employers may require employees who use drugs or alcohol to meet the same standards of performance and conduct that are set for other employees—even when the unsatisfactory performance or behavior is related to drug use or alcoholism.

  Employees may be required to follow the Drug-Free Workplace Act of 1988 and rules set by federal agencies pertaining to drug and alcohol use in the workplace.

- Some drug and alcohol policies may have the effect of deterring individuals from seeking treatment because they drive the problem "underground" as the employee does everything within his or her power to hide a substance abuse problem from an employer.

Recommendation

4.4 The EEOC should encourage employers to develop EAPs that provide incentives to employees to seek treatment for substance abuse problems.

Findings

- Employers and courts struggle with ADA's definition of "current" drug user, which is an important issue because "current" users are expressly excluded from ADA protection.

- The EEOC's Interpretive Guidance and discussion in its Technical Assistance Manual require a case-by-case analysis of "current" use. While helpful, the material does not set forth any definitive standards for which an employer can make this interpretation.

Recommendation

4.5 The EEOC, after consulting with stakeholders, should offer specific and detailed guidance in defining what is a "current" drug user.

Findings

- The EEOC makes it clear in its Technical Assistance Manual that an applicant or employee who tests positive for an illegal drug cannot immediately enter a drug rehabilitation program to avoid the possibility of discipline or termination, claiming that he or she is no longer using drugs illegally.

- Despite the clear language of the Technical Assistance Manual, some employees who test positive for illegal drugs still attempt to avail themselves of ADA protection. This can create "something of a disincentive to employers to offer rehabilitation and other services to employees before addressing any substantive performance problems."

- There is no definitive answer as to whether the employer must provide a leave of absence so the applicant or employee can obtain medical treatment for alcohol abuse. At least one federal district court has ruled that the employer must provide such a leave of absence as an accommodation under the ADA.

Recommendation

4.6 The EEOC, with input from stakeholders, should provide additional guidance on whether employers need to provide leaves of absences for drug or alcohol abuse.

Findings

- In *EEOC v. Exxon Corporation* the court allowed the company, in an across-the-board fashion, to refuse employment to individuals for their past use of drugs and/or alcohol without requiring that the individuals posed a "direct threat."

- The ruling in *Exxon* allows employers to circumvent the EEOC's requirement of an individualized assessment in direct threat situations by arguing that individualized analysis is impossible or impractical.

- *Exxon* now allows employers to designate jobs as "safety sensitive," potentially eliminating entire classes of individuals with disabilities from consideration.

Recommendations

4.7 The EEOC should continue to aggressively support its current regulations, which require the determination that an individual poses a direct threat to a company or to himself be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job.

4.8 The EEOC should provide additional guidance in categorizing a job as "safety sensitive."

CHAPTER 5: PSYCHIATRIC DISABILITIES AND THE ADA

Title I: Employment of Individuals with Psychiatric Disabilities

Findings

- The ADA initially focused on accommodating individuals with physical disabilities; individuals with psychiatric disabilities were largely ignored until discrimination charges based on mental impairments became the largest source of ADA charges filed with the EEOC.

- At the time of the Commission's ADA hearing, the Psychiatric Enforcement Guidance had been recently issued and employers expressed frustration because the EEOC did not conduct formal notice and comment rulemaking on this guidance. These concerns were unfounded; in fact, employers were subject to almost similar disability requirements under the 1973 Rehabilitation Act.

- The EEOC uses notice and comment rulemaking to issue substantive regulations. Before issuing interpretive policy guidance, it considers stakeholder opinions obtained in various ways,

including interactions, letters, and phone calls from advocates and advocacy groups.

- Although the EEOC is not required to conduct notice and comment rulemaking for interpretive policy guidance, its lack of formal process gives the appearance that stakeholders' opinions are not considered.

- EEOC's Psychiatric Enforcement Guidance provides useful guidance and examples of how the ADA should work for employers confronting employment-related issues involving individuals with psychiatric disabilities.

- The Psychiatric Enforcement Guidance's broad definition of mental impairment, referencing the DSM-IV listing of psychiatric disorders as relevant in identifying mental impairments, is consistent with the intention of Congress to cover a wide spectrum of disabilities.

Recommendations

5.1 The EEOC should be given additional funding to provide technical assistance for employers to comply with the Psychiatric Enforcement Guidance. Education and training for employers should be provided by the EEOC.

5.2 The EEOC needs to develop a process for stakeholders to raise concerns and to participate in policy development before the issuing of policy guidance. The EEOC should consider circulating proposed policies, including publication on the Internet, to invite comments from stakeholders.

Title II: Public Entities

Psychiatric Disabilities and the Most Integrated Settings Standard in General

Findings

- Title II of the ADA was broadly written with the goal of making public entities, namely state and local agencies, reconsider their treatment of persons with mental disabilities.

- This goal of the ADA with respect to individuals with mental disabilities is best summarized by DOJ regulations mandating that public entities administer services, programs, and activities that place individuals with mental disabilities in the most integrated settings appropriate for their needs.

- DOJ's regulations were validated by the Supreme Court in *Olmstead*, which established standards by which public entities must provide for the integration of individuals with mental disabilities into community-based settings.

- State and local agencies after *Olmstead* expressed an intent to work toward the integration of individuals with mental disabilities into society. Generally, state and local governments have not committed the personnel resources or the funds necessary to integrate individuals with mental disabilities or multiple disabilities, which include mental disabilities, into society in a manner that is truly meaningful and productive.

- While the move to an integrated setting is an important goal, there remain many instances of neglect and abuse in community-based group homes.

Recommendations

5.3 The DOJ, the SSA, and other federal agencies should promulgate regulations that complement each other and in turn force public entities to establish written Title II policies that have clear, objective, and fair standards by which individuals with mental disabilities may be integrated into community-based settings that are most appropriate for their needs.

5.4 Stakeholders should play a significant role in the development of any and all Title II policies.

5.5 The DOJ, the SSA, and other federal agencies' regulations and policies should provide funding incentives for states that improve the integration of individuals with mental disabilities into community settings.

5.6 The DOJ should develop mechanisms for identifying cases for litigation that involve discrimination against individuals with mental disabilities and that are aimed at defining and refining the protections of the ADA in this area.

5.7 The DOJ should perform compliance monitoring to ensure the proper treatment of individuals with mental disabilities in community-based settings and institutions.

Psychiatric Disabilities and the Most Integrated Settings Standard in the Specific: Olmstead

Finding

- *Olmstead* still allows the states to reject the placement of individuals with mental disabilities in community-based programs or services based on the evaluations of their own administrators or based on their views of what would fundamentally alter the program.

Recommendation

5.8 State and local agency policies should allow individuals with mental disabilities, or those acting as their representatives, to challenge the findings of state and local administrators with respect to the "most integrated setting" for a particular individual. These policies should allow meaningful consideration of the mental health care providers' opinions as to whether these individuals are best served in a community setting.

Individuals with Mental Disabilities and Law Enforcement

Findings

- Law enforcement departments across the nation have taken strides toward improving the services provided to individuals with disabilities who are both the victims and suspects of crime.

- Some law enforcement departments have worked toward complying with the ADA with respect to individuals with mental disabilities by providing training classes and training videotapes.

- Problems remain in the interactions between police and individuals with mental disabilities.

Recommendations

5.9 Congress should provide additional funding to the DOJ to allow it to increase its technical assistance tools, including offering nationwide training of officers in how to interact with individuals with mental disabilities. This training should include how to recognize symptoms and how to approach and interact with individuals with mental disabilities and should include videos and simulations developed in conjunction with disability advocacy groups.

5.10 Law enforcement departments and local precincts should reach out to local community and advocacy groups and conduct classes with group homes and shelters so that both the police and individuals with mental disabilities are sensitive to each others' needs and responsibilities.

5.11 Law enforcement departments should have timely access to mental health experts who are capable of assisting them in ensuring that victims and suspects with mental disabilities are adequately assisted.

5.12 Law enforcement departments should videotape encounters between police and individuals with mental disabilities when these individuals' rights are in jeopardy. For example, when individuals with mental disabilities are detained or questioned, the police must ensure that these individuals understand the implications of any consent.

Title III: Public Accommodations

Findings

- The DOJ has made almost no use of its authority to issue subregulatory guidance under the ADA.

- Insurance plans and/or employers generally provide limited long-term benefit coverage for individuals with mental disabilities while providing lifetime coverage for individuals with physical disabilities.

Recommendation

5.13 The EEOC and the DOJ should issue subregulatory guidance that provides that differential treatment with regard to insurance benefits for individuals with mental disabilities is discriminatory and prohibited by the ADA. This should apply to life insurance, accident insurance, disability insurance, health insurance, and other types of insurance that are subject to coverage under the ADA.

Finding

- Professional licensing boards continue to ask about the mental health background of persons seeking admission on the basis that they have the legitimate purpose of protecting the public and the professions.

Recommendation

5.14 The DOJ should issue subregulatory guidance providing a standard for licensing boards' inquiries into mental health backgrounds of applicants. The guidance should make clear that the focus of the inquiry is on problematic behavior in areas of an applicant's life, which are inconsistent with the duties of the licensee.

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